No. 99-51-CFX

Title: Carl T. C. Gutierrez and Madeleine Z. Bordallo, Petitioners
v.
Joseph F. Ada and Felix P. Camacho

Docketed:
July 2, 1999

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 2 1999	Petition for writ of certiorari filed. (Response due August 1, 1999)
	Jul 30 1999	Brief of respondents Joseph Ada and Felix Camacho in opposition filed.
	Aug 2 1999	Application (99A109) vacate stay of mandate of the United States Court of Appeals for the Ninth Circuit, submitted to Justice O'Connor.
	Aug 2 1999	Motion of respondent to expedite consideration of the petition filed.
	Aug 3 1999	Application (99A109) denied by Justice O'Connor.
	Aug 10 1999	Response to motion to expedite filed.
	Aug 10 1999	Reply brief of petitioners Carl T.C. Guitierrez and Madeleine Bordallo filed.
	Aug 11 1999	DISTRIBUTED. September 27, 1999
	Sep 10 1999	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friay, October 22, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 29, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT December 6, 1999. **********
	Oct 20 1999	Joint appendix filed.
	Oct 20 1999	Brief of petitioners Carl Gutierrez and Madeleine Bordallo filed.
	Oct 22 1999	Brief amicus curiae of Voting Integrity Project filed.
	Nov 4 1999	CIRCULATED.
	Nov 19 1999	Brief of respondents Joseph Ada and Felix Camacho filed.
	Nov 29 1999	Reply brief of petitioners Carl T.C. Gutierrez and Madeleine Bordallo filed.

Supreme Court, U.S.
FILED
'99 51 JUL 2 - 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit prejudicially err in holding that the first paragraph of the Guam Organic Act (48 U.S.C. § 1422), which is applicable solely to gubernatorial elections and requires runoff elections only when a gubernatorial slate has not received a majority of votes in that election, forced a runoff election despite petitioners having received the majority of all valid votes cast in the gubernatorial race

(1) by rewriting the statutory words "in any election" to state "in any general election in which the gubernatorial election is a part,"

(2) by rewriting the statutory words a "majority of votes cast in any election" to mean a "majority of ballots cast in any general election," and

(3) by counting as "votes" ballots that are invalid under Guam election statutes, thereby placing the Ninth Circuit in direct conflict with the Third Circuit's interpretation of the identical language of the Virgin Islands Organic Act (48 U.S.C. § 1591) in *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982)?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo and respondents Joseph F. Ada and Felix P. Camachó.[1]

[1] The Government of Guam, the Guam Election Commission, and its commissioners, Joseph F. Mesa, Joseph T. Duenas, Frederick J. Horecky, Douglas B. Moylan, Rosanna D. San Miguel, and Leonila L.G. Herrero, were named as defendants in the proceeding in the United States District Court for the District of Guam but were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit and are not parties to the proceeding before this Court.

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PETITION FOR WRIT OF CERTIORARI

Carl T.C. Gutierrez and Madeleine Z. Bordallo respectfully petition for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is certified for publication but not yet reported. (Appendix, A-1 – A-23.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (Appendix, A-61 – A-62.)

The order of the United States District Court for the District of Guam is unpublished. (Appendix A-24 – A-56.)

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 19, 1999.[2] The Court of Appeals denied a timely petition for rehearing and suggestion for hearing en banc on May 25, 1999.

[2] The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 48 U.S.C. § 1422 (action arising under federal law).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Organic Act of Guam, 48 U.S.C. § 1422, first paragraph, provides:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.[3]

[3] The remainder of the Act is unrelated to gubernatorial elections.

The Virgin Islands Organic Act, 48 U.S.C. § 1591, first paragraph, provides:

> The Governor of the Virgin Islands, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the legislature of the Virgin Island. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

Title 3 of the Guam Code Ann. § 11111 provides, in pertinent part, that "[a]ny ballot which is not marked as provided by law shall be void . . . ."

Title 3 of the Guam Code Ann. § 11114 provides, in pertinent part:

> If a voter indicates . . . the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.[4]

[4] The entire text of the relevant Guam election laws appears in the Appendix at A-63.

STATEMENT OF THE CASE

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") ran against Joseph F. Ada and Felix P. Camacho ("Ada") for the offices of Governor and Lieutenant Governor, respectively. These were the only two slates running. Gutierrez received 24,250 votes, and Ada received 21,200 votes, giving Gutierrez a margin of a little over 3,000 votes. Under 48 U.S.C. § 1422, the voters were to cast one vote for the two offices on each gubernatorial slate.

In the general election, 1,313 persons who voted did not cast a vote in the gubernatorial election although they voted for other offices; 1,294 voters filled in the space indicating that they intended to vote for a write-in candidate, but 1,019 of them did not write in the name of any candidate; and 609 persons voted for both slates. Gutierrez received a majority of the votes cast unless *all three* of the categories described are also counted as "votes cast"; if any one of these three categories in excluded, Gutierrez won.

The Guam Election Commission certified that the Gutierrez slate had won with 51.21% of the vote. (From the total ballots of 48,666, the Commission deducted the 1,313 blank ballots, leaving a total of 47,353. 24,250/47,353 = 51.21%.)

On December 1, 1998, Ada filed a complaint in the United States District Court for the District of Guam seeking relief declaring that Gutierrez had not won.

The Organic Act of Guam governs gubernatorial elections. The first paragraph of 48 U.S.C. § 1422 deals solely with the gubernatorial election in Guam. It provides, in part:

> *If no candidates receive a majority of the votes cast in any election,* on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. [Emphasis added.]

On December 9, 1998, the district court ruled in Ada's favor. The court held that all ballots in the general election had to be counted as "votes cast" in the gubernatorial race to determine a majority, including those on which no gubernatorial vote was cast. As thus construed, the court held that Gutierrez failed by 83 votes to achieve a majority. The district court ordered a runoff election to be held on December 19, 1998. (Appendix, A-24 – A-56.)

Gutierrez immediately filed an appeal and an emergency motion to stay the runoff election. The motion for stay was granted by the Ninth Circuit on December 15, 1998. (Appendix, A-57 – A-58.)

The Ninth Circuit affirmed the district court's decision by opinion filed April 19, 1999. (Appendix, A-1 – A-23.) The court said that the words "any election" as used in the clause "[i]f no candidates receive a majority of the votes cast in any election" could not refer solely to the

gubernatorial election. Instead, according to the Ninth Circuit "in any election" means "the general election" of which the gubernatorial election was a part. (Appendix, at A-8 – A-9.) The court recognized that counting all the "votes cast" at the general election would reach "an absurd result" with respect to the gubernatorial race. To avoid that absurdity, the court said that the words "votes cast" should be read to mean ballots issued and returned in the general election. (Appendix, at A-10 n.5.)

Gutierrez filed a petition for rehearing and suggestion for rehearing en banc, which was denied on May 25, 1999. (Appendix, A-61 – A-62.) Gutierrez filed a motion to stay issuance of the mandate pending petition to this Court for a writ of certiorari. The Ninth Circuit granted the motion to stay issuance of the mandate, on May 27, 1999. (Appendix, A-59 – A-60.)

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE NINTH AND THIRD CIRCUITS ARE IN DIRECT CONFLICT

The Ninth Circuit acknowledged that its decision conflicts with *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982). In interpreting the language of the Virgin Islands Organic Act (48 U.S.C. § 1591), which is identical to the language of the Guam Organic Act (48 U.S.C. § 1422), the Third Circuit addressed the question whether ballots left blank as to the gubernatorial race should be counted in determining whether a gubernatorial slate had received a majority of the "votes cast" within the meaning of the statute. The Third Circuit held that those ballots left

blank as to the governor's race were not "votes cast": " 'Voters . . . *not voting on the matter submitted* are presumed to assent to the expressed will of those attending and voting and *are not to be taken into consideration in determining the result.*' " 694 F.2d at 941 (emphasis added). *Todman* is based on the principle enunciated by this Court in *County of Cass v. Johnston*, 95 U.S. 360, 24 L.Ed. 416 (1877), that qualified voters who do not choose to vote are deemed to assent to the choices of the voters who do vote. 95 U.S. at 369.

No choice in a gubernatorial election is expressed by persons who cast no vote in that race, even if such persons cast a vote for a different elective office on the same ballot. Those persons are in the same situation as to the gubernatorial race as the voter who stayed home on election day. Therefore ballots containing no votes in the gubernatorial race should not be counted as "votes cast." But even if all of the ballots were counted including those of persons who indicated they would vote for a write-in candidate but did not, the Gutierrez slate unquestionably won a majority:

Gutierrez	24,250
Ada	21,200
Write-in Ballots	1,294
Total	46,744
Majority needed to win	23,373

Gutierrez's receipt of 24,250 votes thus exceeded the majority of the votes cast by 877 votes.

Ada appears to have counted the "votes cast" as follows:

Gutierrez	24,250
Ada	21,200
Write-in Ballots	
Candidate named	275
Candidate not named	1,019
Blank ballots	1,313
Votes for both slates	609
Total	48,666
Majority needed to win	24,334

Ada argued that Gutierrez was short of a majority by 84 votes.[5]

The Guam Election Commission, however, certified that the Gutierrez slate had won with 24,250 of the 47,353 ballots (which was the total number of ballots of 48,666, less the 1,313 blank ballots).

The Gutierrez slate unquestionably won a majority of the votes cast unless "votes cast" includes all of the following: ballots on which no votes were cast in the gubernatorial election; ballots which indicated they were "write-in" but on which no write-in candidate was named; and spoiled (improperly marked) ballots.[6]

---

[5] Notably, to reach this result, Ada must count as "votes cast" all of the following: (1) ballots on which no vote was cast in the gubernatorial race, (2) write-in ballots which were blank as to the name of a candidate, and (3) invalid ballots on which persons voted for both slates. If any of these categories is omitted from the calculation, Gutierrez received a majority.

[6] This is consistent with the applicable election laws of Guam, which direct that ballots left blank as to a particular race, overvotes, and spoiled ballots are not to be counted for purposes of that race. As provided in the Guam Election Code, "If a voter indicates . . . the choice of more than there are candidates to be elected or certified for any office, *or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office*. . . . " 3 Guam Code Ann. § 11114 (emphasis added). *See also* 3 Guam Code Ann. § 11111 ("any ballot which is not marked as provided by law shall be void . . . ").

II. THE NINTH CIRCUIT HAS IMPERMISSIBLY REWRITTEN 48 U.S.C. § 1422

Section 1422 of Title 48 is straightforward in its application to gubernatorial elections. Yet instead of applying the statute as written, the Ninth Circuit isolated one phase – "in any election"; took it completely outside of the context in which the phase was used; and then substantively rewrote the statute.

The first paragraph of Section 1422 deals solely with gubernatorial elections. The fourth sentence of that paragraph provides that, "[i]f no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held. . . . " The most logical interpretation of this phrase, the only interpretation supported by the syntax in which the phrase appears, and an interpretation entirely consistent with the rules of statutory construction is that the phrase "in any election" means "in any *gubernatorial* election." That is the singular focus of the provision at issue. Indeed, the sentence preceding those words is limited to gubernatorial elections, and the sentences following those words address specifically the first election for Governor and Lieutenant Governor, as well as the subsequent gubernatorial elections to be held every four years.

Furthermore, the third sentence of Section 1422 states that "[t]he Governor and Lieutenant Governor shall be chosen jointly, by the *casting* by each voter of a *single vote* applicable to both offices." [Emphasis added]. This sentence makes clear that Congress intended that a "vote cast" is a single vote that is in fact *cast* in the *gubernatorial* election. Thus, the plain language of Section 1422 clearly limits the phrase "votes cast in any election" to the gubernatorial election.

The Ninth Circuit rejected this simple, straightforward, and logical construction of this provision. Instead, the court isolated the phrase "in any election" from the context in which it appears and determined that in order to win a majority of votes cast in any election, a gubernatorial slate must win a majority of *all votes* cast in the *entire general election*. "Congress intended 'votes cast' to constitute the votes cast for *any* of the offices up for election at the general election; that is, the number of ballots cast." (Appendix, at A-9 – A-10.) According to the court, this construction is necessary in order to give meaning to the phrase "in any election." The court said:

> We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to votes cast in the single election for governor and lieutenant governor.

(Appendix, at A-9.)

The court's expanded interpretation of the phrase "in any election" not only takes the phrase out of context, but, contrary to the court's assertion, is not necessary to give it meaning. The phrase "in any election" is given

meaning by the fact that the statute refers to both the initial gubernatorial election and subsequent gubernatorial elections (*i.e.*, in any of the *gubernatorial* elections, whether the first or a subsequent one specifically discussed in Section 1422).

The court also disregarded Congress' intent that a vote cast is a single vote that is in fact cast in the gubernatorial race. The court said that the third sentence of Section 1422, as set forth above, simply requires that the candidates for Governor and Lieutenant Governor run as a single slate. The court failed to recognize that a vote cast is required to be cast in the manner described, *i.e.*, "by the casting by each voter of a single vote . . . . " Returning a ballot upon which a person has voted for a candidate in an election other than for Governor and Lieutenant Governor does not meet the test for a vote cast because that person did not "cast[ ] . . . a single vote applicable to both offices." The statute does not state that a vote is "cast" by returning a ballot or by returning a ballot upon which the person has cast two votes (one for each slate), or by returning a ballot that contains no vote for Governor.

Even more significant, the court was forced to substantively rewrite the statute in order to support its construction. The court impermissibly substitutes the concept of "ballots" for "votes."

> [Petitioners argue] that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes

that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely.

(Appendix, at A-10 n.5.)

As the court observed, its "interpretation equates 'votes cast' with 'ballots cast.' " That is not what the statute says. Nor, as explained above, is such a substantive modification of the statute necessary to give effect to the phrase "in any election." By eschewing the most logical, common sense interpretation of that phrase, the court is led from one distortion to another. A simple reading of the ordinary language of the statute shows that the Ninth Circuit decision is wrong. Nothing in the statute suggests that "ballots" – not votes – should be counted. Nothing in the statute suggests that "votes cast" includes votes that are not cast.

The court offered no explanation for its cavalier disregard for or invalidation of the applicable Guam election statutes that do not count overvotes, undervotes and spoiled ballots. The court likewise disregarded the interpretation of Guam's election statutes by the Election

Commission which has been charged with the responsibility of interpreting and applying those statutes.

Finally, the court's decision is unsettling because it compels a runoff election in a situation in which it was never intended. A runoff election, as understood in the traditional sense, occurs when there are more than two candidates running, and while one of the three (or more) may win a plurality, none wins a majority. That is the situation in which a true "runoff" occurs between those two candidates who garnered the highest and second highest number of votes of the three (just as Section 1422 says). In the present case, the exact same two gubernatorial slates would repeat the election held last November and, under the Ninth Circuit's interpretation of Section 1422, this "runoff" election could potentially be repeated in perpetuity.

III. THE IMPORTANCE OF THE QUESTION PRESENTED

The election of the Governor and Lieutenant Governor of Guam and the Virgin Islands is every bit as important to the citizens of those American Territories as gubernatorial elections are to the citizens of the several States. Indeed, it can be argued that the election of Governor in the American Territories is of even greater significance to the people of the Territories insofar as they have no voting representatives in Congress and no electoral votes to determine our country's President. The Governor of the Territory is the highest elected officeholder representing the people of the Territory, and therefore the validity and integrity of these elections are even more

vital to preserve the limited democratic rights accorded the people of the Territories. The confidence of the citizens in the fairness and reliability of the election process is indispensable. Public perception of the judiciary is likewise affected when courts have been asked to intervene in that process. Traditionally the federal judiciary has quickly responded to electoral challenges, and the courts have ordinarily answered election issues in a way voters can understand, as typified by *Todman*.

The people of Guam who have read the opinions below will have great difficulty understanding why the courts have required a second election when one slate had a clear majority of all the valid votes cast in the gubernatorial election.

Runoff elections cause a host of political problems, not the least of which is political instability. Compelling a runoff election – especially when none should have been ordered – imposes serious costs on Guam's citizenry. Moreover, a runoff election can change results because the number of qualified votes can change in the interim, and voters who voted the first time may not bother to do so the second time around. The whole community must bear the costs and disruption of litigation and of runoff elections.

The citizens of Guam are entitled to have the statutes governing their elections interpreted in accordance with their ordinary plain meaning. Nothing in the language of Section 1422 or in Guam's election laws is obscure. It is the convoluted reasoning of the Ninth Circuit that is baffling.

Unless this Court grants review, the same statutory language in the election law applicable to gubernatorial races in the Virgin Islands and Guam will remain in conflict thereby assuring that different election results will occur in Guam and the Virgin Islands on the same facts. Without resolving the conflict, future litigation in election cases is virtually guaranteed in those Territories.

The decision of the Ninth Circuit is so clearly erroneous that a summary reversal would be appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 1, 1999

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, *Plaintiffs-Appellees*, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, *Defendants*, and CARL T. C. GUTIERREZ; MADELEINE Z. BORDALLO, *Real Parties in Interest-Appellants*.	No. 98-17306 D.C. No. CV 98-066 OPINION

Appeal from the District Court of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted
March 8, 1999 – San Francisco, California

Filed April 19, 1999

Before: John T. Noonan and A. Wallace Tashima, Circuit Judges, and Jane A. Restani, Court of International Trade Judge.*

Opinion by Judge A. Wallace Tashima

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Dennis Riordan, Riordan & Rosenthal, San Francisco, California, Curtis Charles Van de Veld, The Van de Veld Law Offices, Agana, Guam, for the plaintiffs-appellees.

OPINION

TASHIMA, Circuit Judge:

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo (together "Gutierrez") ran against Joseph F. Ada and Felix P. Camacho (together "Ada") for the offices of governor and lieutenant governor, respectively. Gutierrez received 24,250 votes, and Ada garnered 21,200 votes. After the Guam Election Commission certified Gutierrez as the winner, Ada filed suit in federal court seeking a declaration that Gutierrez was not elected by a majority of the votes cast, as required by the Guam Organic Act

* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

and a writ of mandamus requiring a runoff election to be held. The district court granted Ada's petition for a writ of mandamus. Gutierrez appeals, contending that the district court misinterpreted federal law and therefore erred in ordering a runoff election. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1),[1] and we affirm.

[1] In his complaint, Ada challenged the election results on two bases: that the district court misinterpreted federal law and that the election had been riddled with voting irregularities. The district court deferred addressing the latter issue:

> Though the Court now restricts this ruling to the isolated issue of interpretation of the Organic Act, the Court defers rather than rejects ruling on the other aspects of the election. If the territory's administrative and judicial corrective process timely and sufficiently addresses other questions and discrepancies of the election, thereby affording fundamental fairness to the voters of this territory, further intervention of a federal court should not prove necessary. If it does not, then, this Court will intervene.

Because the district court's order did not provide Ada with all of the relief he sought, and because the district court did not certify the entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b), Ada's appeal is interlocutory in nature, despite the parties' agreement that we have jurisdiction under 28 U.S.C. § 1291.

28 U.S.C. § 1292(a)(1), however, authorizes appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1) (1998). It is immaterial that the district court's order was labeled a writ of mandamus instead of an injunction because "[i]n determining the appealability of an interlocutory order under 28 U.S.C. § 1292(a)(1), we look to its substantial effect rather than its terminology." *Armstrong v. Wilson*, 124 F.3d

I.

48 U.S.C. § 1422 sets forth the qualifications for the offices of governor and lieutenant governor of the Territory of Guam and the electoral procedures for filling these offices. *See* 48 U.S.C. § 1422 (1987). The governor and lieutenant governor are elected jointly; therefore, candidates for these offices must run together on a slate. *See id.* The prevailing candidates are those who receive a majority of the votes cast. *See id.*

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

Id.

At stake at the general election on November 3, 1998, were the offices of governor and lieutenant governor,

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1019, 1021 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998) (quoting *Tagupa v. East-West Ctr., Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981)) (internal quotation marks omitted) (alteration in original). Because the district court's order had the same effect as a mandatory injunction, this court has jurisdiction pursuant to § 1292(a)(1). *See Tagupa*, 642 F.2d at 1129 (finding the denial of a writ of mandamus appealable under § 1292(a)(1)).

delegate to the United States Congress, membership in the Guam legislature, and on various school boards. The Democratic gubernatorial slate of Gutierrez and Bordallo garnered 24,250 votes and the Republican gubernatorial slate of Ada and Camacho received 21,200 votes. An additional 1,294 voters voted for write-in candidates; 1,313 persons who voted in the general election neither voted for a gubernatorial slate nor cast a write-in vote ("blank ballots" or "undervotes"); and 609 persons voted for both slates ("overvotes"). The sum of these ballots was 48,666, of which Gutierrez received 49.83% and Ada received 43.56%.

On November 16, the Guam Election Commission[2] certified that the Gutierrez slate had won with 51.21% of the vote. The Election Commission arrived at this result by deducting the 1,313 undervotes from the total ballots cast, resulting in a total of 47,353 ballots. Write-in ballots and overvoted ballots were included in the total from which a majority was determined.

On December 1, Ada filed a complaint in the District Court of Guam seeking a declaratory judgment that Gutierrez had not been elected by a majority of the votes cast, as required by § 1422, and a writ of mandamus ordering that a runoff election be held.[3] On December 9, the

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[2] The Guam Election Commission is composed of three individuals nominated by the Republican Party, three individuals nominated by the Democratic Party, all selected by the governor, and a seventh member selected by the other six members. At the time of the November 3 election, the seventh member had not been selected..

[3] On the same day, Ada filed a companion lawsuit in Guam Superior Court, which the district court characterized as

district court held in favor of Ada and granted a writ of mandamus ordering that a runoff election be held on

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"focus[ing] on interpretation of local law and allegations of voting irregularity, not the federal question." On February 16, 1999, the Superior Court found that Ada had failed to prove his allegations of election irregularities and held that the Gutierrez slate had won the election. *See Ada v. Gutierrez*, No. CV 2765-98, at 233 (Guam Super. Ct. Feb. 16, 1999). In so finding, the Superior Court "respectfully disagreed with the determination reached by the District Court on the majority issue, and with regard to the above captioned matter, such determination shall be applied to the issues involved herein." *Id.* at 85. Specifically, the Superior Court decided that undervotes, overvotes, and write-in votes for which the voter selected the write-in option but did not write in a name should not be counted as "votes cast." *See id.* at 83-84.

Gutierrez does not contend that the Guam Superior Court's order should be given preclusive effect. We agree that we are not bound by the decision of the Guam Superior Court, if for no other reason than because it is currently on appeal to the Supreme Court of Guam. Although we find no Guam decision holding that a judgment on appeal has no preclusive effect, title 6, § 4209 and title 7, § 26707 of the Guam Code, which govern the preclusive effect of final judgments, are essentially identical to California Civil Procedure Code §§ 1908 and 1049 respectively, and therefore should be similarly interpreted. "Appellate courts have consistently recognized that decisions of California courts which predate the enactment of the Territorial Laws are controlling authority on issues of the statutory construction and effect of Guam laws, and that California cases subsequent to the adoption of the Guam codes while not binding, are persuasive." *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975). It has been long established in California that a judgment is not final for purposes of res judicata while the judgment is on appeal. *See, e.g., Brown v. Campbell*, 35 P. 433, 436 (Cal. 1893) (citing Cal. Civ. Proc. Code. § 1049); *Agarwal v. Johnson*, 603 P.2d 58, 72 n.11 (Cal. 1979) (same). Therefore, it appears that the Guam Superior Court's order is not entitled to preclusive effect.

December 19.[4] On December 15, a motions panel of this court issued an emergency stay of the district court's order pending the outcome of this appeal.

Gutierrez contends that the district court erred in issuing the writ of mandamus because the inclusion of undervotes in the "votes cast" contradicts the plain language of § 1422, prior case law, Guam election law, and common sense.

II.

We review the district court's decision to issue a writ of mandamus for an abuse of discretion. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997). A district court abuses its discretion if "its decision is based on clearly erroneous factual findings or an incorrect legal standard." *Id.* The interpretation of a statute is a question of law reviewed de novo. *See Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998).

III.

As with all exercises in statutory interpretation, we begin with the statute's text. We "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the

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[4] The order provides, "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Guam Election Commission shall hold a runoff election as referred to in § 1422 of the Organic Act. The runoff election between the Democratic and Republican gubernatorial candidates shall be held on Saturday, December 19, 1998."

intent of Congress." *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir. 1997) (internal quotation marks omitted) (citation omitted). If the statute is ambiguous, resort to legislative history is appropriate. *See id.*

A. 48 U.S.C. § 1422

Gutierrez argues that § 1422 is unambiguous in including only votes actually and validly cast for the gubernatorial race in the calculation of a majority. By employing the phrase "votes cast," Gutierrez contends that Congress necessarily excluded ballots on which votes were not cast for governor and lieutenant governor. Furthermore, Gutierrez urges that the sentence "The Governor and Lieutenant Governor shall be chosen jointly, *by the casting by each voter of a single vote* applicable to both offices," § 1422 (emphasis added), implies that "votes cast" encompasses actual votes – not ballots blank with respect to the governor's race. Gutierrez also relies on legislative history to buttress his interpretation.

Ada reaches a contrary conclusion by relying on a different portion of § 1422: "If no candidates receive a majority of the votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held. . . . " § 1422 (emphasis added). Ada argues that if Congress had intended for a majority to be measured by the votes cast only in the gubernatorial race rather than the votes cast in the entire election, it would have said so, instead of using the phrase "in any election."

Section 1422 provides for a runoff election in the event that "no candidates receive a majority of the votes

cast in any election." Because Congress provided no other direction in § 1422 for determining what constitutes a majority, we must give effect to these words. We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor.

Gutierrez would have this court reject this interpretation because in providing that the victors "shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices," Congress made clear its intent that an actual vote must be cast for a gubernatorial candidate to constitute a vote cast for purposes of calculating a majority. This interpretation is problematic because it renders the phrase "in any election" a nullity, and thus violates "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988).

Furthermore, Gutierrez's interpretation requires the phrase "by the casting by each voter of a single vote" to carry more weight than it can support. This phrase merely establishes the requirement that candidates for governor and lieutenant governor run on a single slate. It is the sentence using the phrase "in any election" that establishes the majority requirement and, therefore, that should be accorded greater weight. The better interpretation is that Congress intended "votes cast" to constitute

the votes cast for *any* of the offices up for election at that general election; that is, the number of ballots cast.[5]

Our interpretation is buttressed by a comparison of § 1422 to 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to the United States Congress. *See* 48 U.S.C. § 1712 (1987). In contrast to § 1422, § 1712 expressly requires that a candidate receive "a majority of the votes cast for the office of Delegate." Section 1712 provides in relevant part:

> The Delegate shall be elected at large, by separate ballot and by *a majority of the votes cast for the office of Delegate*. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate.

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[5] Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely.

Id. (emphasis added). If Congress had intended a gubernatorial slate to require only a majority of the votes cast for governor and lieutenant governor, presumably, it would have used language similar to that used in § 1712. Furthermore, given the fact that § 1422 and § 1712 involve the closely-related subjects of the election of Guam's governor, lieutenant governor, and delegate to Congress, it can be inferred that, by employing such clearly different language, Congress intended to depart from the scheme fashioned in § 1422, when it enacted § 1712 four years later.

In sum, the text of § 1422 and the differences between it and § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates.

The parties make a number of additional arguments in support of and against this interpretation. Although these arguments neither compel this interpretation nor call it into question, we address each in turn.

B. Legislative History

Legislative history does not shed much light on the proper interpretation of § 1422. The portion of § 1422 at issue in this case was added in 1968 by the Guam Elective Governor Act. *See* Guam Elective Governor Act, Pub.L.

No. 90-497, 82 Stat. 842 (1968). The House Report accompanying the Act merely summarizes the relevant statutory language without explaining Congress' choice of words. See H.R.Rep. No. 90-1521 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3564.

Gutierrez would have us adopt the construction given § 1422 by the House of Representatives in its adjudication of an election contest for the office of the Guam delegate to the House arising from the Guam general election in 1984. The Guam Election Commission certified Ben Blaz the winner after he received 354 more votes than Antonio Won Pat. *See* H.R.Rep. No. 99-220, at 2 (1985). In doing so, the Election Commission did not include overvotes or undervotes in its tabulation of the majority. Won Pat filed a contest of the election with the House of Representatives in part on the basis that Blaz had not received a "majority of the votes cast" as required by § 1712 because the overvotes and undervotes should have been included. *See id.* at 2, 4. The House dismissed the election contest after concluding that undervotes should not have been included because: (1) under the Guam Election Commission's interpretation of Guam election law, blank ballots deposited in the ballot box should be treated no differently than blank ballots returned to a polling official for cancellation; and (2) the Third Circuit's decision in *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), which held that blank ballots should not be counted in determining a majority in the Virgin Islands gubernatorial election, "enjoys general acceptance in

jurisdictions governed by statutory provisions similar or identical to Guam's." *Id.* at 4.[6]

We reject the argument that the House's resolution of this election contest should guide our interpretation of § 1422. The most important reason for rejecting that election contest as precedent is that, despite the House Report's suggestions to the contrary,[7] § 1712 is drafted very differently than § 1422. As discussed above, § 1712 expressly defines the relevant majority for the election of the Guam delegate: "The Delegate shall be elected at large, by separate ballot and by a majority of the votes cast *for the office of Delegate*." § 1712 (emphasis added). Therefore, § 1712's text clearly excludes undervotes, because such ballots do not cast a vote for this particular office. In contrast, § 1422 requires "a majority of the votes cast *in any election*." § 1422 (emphasis added). At the very least, the text of § 1422 leaves open the possibility that undervotes should be included.

Additionally, we reject the House election contest as precedent in light of established principles of statutory

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[6] The House of Representatives did not reach the merits of Won Pat's claim that overvotes should have been included because their inclusion would not have changed the result in light of the decision to exclude undervotes. *See* H.R. Rep. 99-220, at 5.

[7] For example, the House Report notes that "[s]imilar Federal statutory language governs the election of Governors and non-voting Delegates from each of the Territories." H.R. Rep. No. 99-220, at 3. The Report also describes *Todman*, which involved a statute identical to § 1422, as addressing "the identical issue" as that posed by the election contest based on § 1712. *Id.* at 4.

construction. First, the election contest came 17 years after Congress enacted the language in question in § 1422. The Supreme Court has cautioned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotation marks omitted) (citation omitted).

> Such history does not bear strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Id. at 118 n.13. Second, even if subsequent legislative history is useful and resolution of an election contest qualifies as legislative history, the contest was adjudicated only by the House of Representatives, not the Senate – both of which were required to enact the relevant language in § 1422.

In sum, we find nothing in the legislative history that suggests a different interpretation of § 1422 than that suggested by its text.

C. *The* Todman *Decision*

Gutierrez argues that we should follow the Third Circuit's decision in *Todman*, in interpreting § 1422. In *Todman*, the court held that undervotes should not be counted in determining whether a candidate for governor of the Virgin Islands received a majority of the votes cast

under 48 U.S.C. § 1591. *See* 694 F.2d at 940. The text of § 1591, which provides for the election of the governor and lieutenant governor of the Virgin Islands, is identical to that of § 1422. We respectfully decline to follow *Todman*, however, because it does not provide a more persuasive interpretation of the relevant statutory language than that gleaned from our own textual analysis of § 1422.

Todman's discussion of the merits embraced the reasoning of a decision by the District Court of the Virgin Islands:

> In reaching this conclusion, we note that in *Euwema v. Todman*, [323 F. Supp. 167 (D.V.I. 1971)], Judge Almeric Christian stated that "the proper basis for computing a majority" was that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." We agree with this statement of the law.

Todman, 694 F.2d at 941. Despite this language, however, we note that *Euwema* does not compel the result reached in *Todman*. There were two issues in *Euwema*: (1) whether a referendum on whether to lower the voting age in the Virgin Islands was a special election or part of the general election held the same day, *see* 323 F. Supp. at 168-169; and (2) whether the phrase "a majority of the qualified voters in the Virgin Islands" meant a majority of the citizens qualified to vote or a majority of the citizens who actually voted, *id.* at 169, 171. The first issue was important because there was a discrepancy between the relevant federal statute and the Virgin Islands statute as to

whether the required majority was of the votes cast only on the referendum or of the votes cast at the entire *general* election. In deciding that the Virgin Islands statute was void to the extent that it conflicted with the federal statute, the court characterized as settled law the principle that, for *general* elections, a "proposition is not carried by a majority of the votes cast therefor unless such majority is also a majority of all votes cast at the election." *Id.* at 170 (citing authorities from a number of states) (internal quotation marks omitted) (citations omitted). Because the referendum in question was found not to be part of the general election, this general rule did not apply. *See id.* at 170-71.

The language cited by *Todman* was taken from *Euwema*'s discussion of the second issue: whether "a majority of the qualified voters" meant a majority of the citizens of the Virgin Islands qualified to vote or a majority of the citizens who actually voted. The *Euwema* court came to the unremarkable conclusion that qualified voters who fail to go to the polls are not included in the base count in determining whether the referendum received a majority:

> In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. . . . [A]lthough there are cases that point to a contrary conclusion, generally the term "qualified voter" in a provision as to the proportion of voters necessary for the adoption of a measure refers, not to

> those qualified and entitled to vote, but to those qualified and actually voting.

Euwema, 323 F. Supp. at 171 (quoting what is now 26 Am.Jur.2d Elections § 406 (1996)).

We, therefore, draw a different conclusion from *Euwema* than did the *Todman* court – that ballot propositions that require a majority of the votes cast and are part of a general rather than a special election typically require a majority of all votes cast at the general election – not just the votes cast on the particular initiative.[8]

D. Case Law at the Time of § 1422's Enactment

Gutierrez contends that § 1422's interpretation is governed by *County of Cass v. Johnston*, 95 U.S. 360 (1877), which, Gutierrez argues, stands for the proposition that voters who do not express a preference in a particular race defer to the choice of those who do:

> This we understand to be the established rule as to the effect of elections, in the absence of any

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[8] Furthermore, despite the House of Representatives' assertion to the contrary, *see* H.R. Rep. No. 99-220, at 4, there is no indication that *Todman* has gained general acceptance in other jurisdictions. *Todman* has been cited in only three cases, only one of which actually relied on *Todman* instead of on the underlying district court opinion, which *Todman* reversed on other grounds. *See Stapleton v. Board of Elections*, 821 F.2d 191, 193 (3d Cir. 1987) (discussing district court case); *Democratic Party of the Virgin Islands v. Board of Elections*, 649 F. Supp. 1549, 1551-52 (D. V.I. 1986) (same); *Republican Party of Hawaii v. Waihee*, 709 P.2d 980, 981 (Haw. 1985) (noting *Todman*'s holding that blank ballots are not "votes cast").

> statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

Id. at 369. *Cass*, however, is not as expansive as Gutierrez contends and is not controlling for the same reasons that we do not find the *Todman* court's reliance on this language persuasive.[9] First, *Cass* addresses the issue of whether qualified voters who do not go to the polls should be included when calculating a majority. *See id.* at 365. Qualified voters who did not participate in the Guam election are not at issue in this case. Second, *Cass* expressly notes that this principle applies only in the absence of a statutory provision to the contrary. *See id.* at 369. As discussed above, we believe that § 1422 provides such direction.

Ada points to state court decisions interpreting language similar to that used in § 1422 as requiring a majority of all votes cast at an election. For example,

> [i]t is the general rule that when a proposition is required to carry by a majority *of the votes cast* at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question. California has been classed among the majority holding to this construction.

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[9] This language is virtually identical to that quoted in *Todman*, 694 F.2d at 941, and *Euwema*, 323 F. Supp. at 171.

People ex rel. Charles T. Smith v. City of Woodlake, 41 Cal.App.2d 119, 122-23 (Cal. Ct. App. 1940).[10]

Ada argues that this case law is relevant because we should assume that Congress acted against the background of these judicial interpretations when it enacted § 1422. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meanings of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word. . . . "); *Miller v. Commissioner of Internal Revenue*, 836 F.2d 1274, 1282 (10th Cir. 1988) ("[W]hen Congress uses a term of art which has received a consistent judicial interpretation, there is a heavy presumption that Congress and the President have incorporated the prior meaning.").

We find these state law cases to be of limited value. Not only did many of the cases predate the enactment of § 1422 by a number of years, but each turns on the specific language of the governing statutory provision in

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[10] *See also City of Santa Rosa v. Bower*, 142 Cal. 299, 301-02 (Cal. 1904) (requiring "a majority of . . . qualified electors voting thereat"); *People v. West Side County Water Dist.*, 112 Cal.App.2d 228, 231-33 (Cal. Ct. App. 1952) (requiring "a majority of the votes cast at the election"). The Supreme Court of Nebraska reached the same conclusion after an extensive analysis of case law from other jurisdictions. *See Thurston County Farm Bureau v. Thurston County*, 287 N.W. 180, 185-88 (Neb. 1939). The *Thurston County* court went so far as to conclude, "[t]he rule announced in these decisions is too firmly established to be further questioned in this state." *Id.* at 188.

question. Furthermore, a number of cases reach a different result.[11] Therefore, these cases do not establish a rule that is equivalent to a term of art encapsulating well-established judicial precedent such that Congress surely must have intended to incorporate its meaning when it enacted § 1422; these cases support our interpretation of § 1422, but do not compel it.

E. Guam Election Law

Gutierrez argues that Guam election law precludes the inclusion of undervotes and overvotes in the computation of the votes cast because 3 Guam Code Ann. § 11114 provides that ballots for which it is impossible to determine the voter's choice should not be counted in the race for that office. Section 11114 states that, in the event that a voter indicates

> the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice

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[11] For example, in *Alaska Native Ass'n of Oregon v. Morton*, 417 F. Supp. 459 (D.D.C. 1974), the court noted that "a majority is determined on the basis of those voting on the particular proposition on the ballot, not on the number of ballots cast." *Id.* at 468. Similarly, in *Munce v. O'Hara*, 16 A.2d 532 (Pa. 1940), the Supreme Court of Pennsylvania adhered to "what we regard as the better view" that "a majority vote of [a town's] qualified electors cast at any general election" refers to the votes cast on the proposition in question, not on other questions or for candidates for office. *Id.* at 532, 533. *See also Wooley v. Sterrett*, 387 S.W.2d 734, 740 (Tex. Civ. App. 1965) (following rule enunciated in *Munce*); *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Haw. 1997) (holding that "a majority of the ballots cast upon such a question" includes blank ballots and overvotes).

> for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.

3 Guam Code Ann. § 11114 (1998). Section 11114, however, establishes only that invalid votes and blank votes are not counted in favor of any candidate for the office for which they are invalid or blank. It does not preclude those ballots from being counted as "votes cast" for purposes of determining a majority. In fact, § 11114 expressly provides that these ballots are still valid for purposes of other races in the election.[12] We thus conclude that Guam election law does not shed any additional light on the proper interpretation of § 1422.[13]

F. Policy Considerations

Finally, Gutierrez argues that it is nonsensical to require a runoff election when there were only two gubernatorial slates in the election and even more so because Gutierrez would have received a majority of the votes validly cast even if all of the write-in votes had

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[12] The same is true for 3 Guam Code Ann. § 11111, which provides in relevant part that "[a]t any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved." 3 Guam Code Ann. § 11111 (1998). The fact that a particular vote on a ballot is invalid does not mean that the ballot should not be counted in determining a majority.

[13] Even if Guam election law contradicted our interpretation of § 1422, Guam law would not control because Guam law cannot trump conflicting federal law. *See Euwema*, 323 F. Supp. at 170 (invalidating Virgin Islands election statute to the extent that it contradicted federal election statute).

gone to Ada. There is a good deal of appeal to this contention. The fact that a runoff election seems superfluous in this particular instance, however, does not strip the runoff requirement of all justification. For example, as Ada points out, Congress' purpose in its choice of language in § 1422 may have been to confer on the victors the greater legitimacy of having received more than 50 percent of the votes of all voters participating in the election. Furthermore, Congress obviously was aware of the strong two-party tradition in this country when it adopted § 1422's majority requirement and, therefore, could have predicted that two-slate dominance was a likely occurrence. The argument that a new election will not change the old should be made to Congress and not the courts. Thus, despite the various policy arguments for or against allowing a seemingly indifferent minority to force a runoff, the language Congress chose when it enacted § 1422 requires such a result.

IV.

Section 1422's requirement that a gubernatorial slate secure "a majority of the votes cast in any election" to win is better interpreted as requiring a gubernatorial slate to garner a majority of the votes cast in the general election, rather than only in the gubernatorial race, if we are to give force to the words chosen by Congress. The Guam Election Commission should have included undervotes and overvotes in the total number of votes cast. As a result, the Gutierrez slate failed to secure a majority of the votes cast, necessitating a runoff election between the Gutierrez and Ada slates.

Because the district court did not base its decision on an incorrect legal standard, it did not abuse its discretion in issuing a writ of mandamus. Accordingly, the order of the district court is AFFIRMED and this case is REMANDED to the district court for further proceedings.[14] The emergency stay issued on December 15, 1998, is dissolved.

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[14] We leave it to the district court, in its discretion and after hearing from the parties, to determine whether it should set the date of the runoff election or require the Guam Election Commission to do so.

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JOSEPH F. ADA, et al., Petitioners, vs. GOVERNMENT OF GUAM, GUAM ELECTION COMMISSION, Respondents, CARL T.C. GUTIERREZ, et al., Real Parties in Interest.	Civil Case No. 98-00066 ORDER & WRIT OF MANDAMUS (Filed Dec. 9, 1998)

This case is before the Court on a Petition for Writ of Mandamus and prayer for Declaratory Relief decreeing that candidates Carl T.C. Gutierrez and Madeleine Bordallo were not elected by a majority of the votes cast, as required by the Organic Act, 48 U.S.C. §1421 *et seq.* The Complaint alleges and prays for other relief, which will not be addressed in this Order.

THE CASE:

The Court accepts as a starting point the undisputed fact that the Election Commission certified the following results: Carl T.C. Gutierrez and Madeleine Bordallo (hereinafter "the Democratic candidates") received 24,250 votes and Joseph F. Ada and Felix P. Camacho (hereinafter "the Republican candidates") received 21,200 votes,

1,294 votes were cast for write-in gubernational candidates, 1,313 votes were cast which did not vote for any gubernational candidates, and 609 votes were cast which voted for both gubernatorial candidates. At the time of certification, though the initially [sic] tally reflected that 48,666 voters cast ballots, the Guam Election Commission changed the total ballots cast to 47,353 (by not counting 1313 ballots on which there was no vote for either candidate) and certified the result on November 16, 1998. The result certified was that the Democratic candidates won the election with 51.21% of the 47,353 votes cast.

The Petition for Writ seeks a ruling that the candidates certified as winners were not elected by a "majority of votes cast" as required by the Organic Act, 48 U.S.C. §1422:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam.

The Petitioner argues that because the total number of votes cast in the gubernatorial election was 48,666, the winner would have to receive a majority, which is more than half of the votes cast. Half of 48,666 is 24,333. Petitioner argues that because the Democratic candidates did not receive at least 24,333 votes, a run-off election must be held under §1422 of the Organic Act:

> If no candidates receive a majority of the votes case [sic] in any election, on the fourteenth day thereafter a runoff election shall be held

between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

The election was held on November 3, 1998. The election results were certified on November 16, 1998.[1] This Petition was filed on December 1, 1998. A scheduling conference was held on December 4, 1998, and the Court

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[1] The "numbers" were presented to an Election Commission meeting on November 12, 1998. The Guam Election Commission is composed of seven members, three recommended by the Republican party and three recommended by the Democratic party. 3 G.C.A. §2101(a). The six members are supposed to choose the seventh member, but this had apparently not happened because during the time period involved in this case, there were only six members of the Election Commission. The Chairperson is chosen annually by the remaining members. 3 G.C.A. §2101(c).

From the time period of November 3, 1998 (the date of the election) to November 12, there were only two remaining representatives of the Republican party on the Commission because one was absent from the island for unexplained reasons. On November 12, 1998, the returning Republican member appeared to the astonishment of her Republican colleagues but voted against certifying the winners of the election. On November 16, 1998, a meeting was scheduled for noon. It was canceled by Joe Mesa, the Chairperson, on request, shortly before the meeting. Notice of the cancellation was disseminated to the press and public. However, unbeknownst to spectators, press and public, the meeting was nonetheless called by Democratic member Horecky as an "emergency" meeting even though reportedly canceled. Joe Mesa did not attend because he had himself canceled the meeting as Chairperson of the commission and the emergency meeting apparently was not reported to him. The remaining members quickly put the issue of election certification before the members present. The three Democratic members and the returning Republican member declared the Democratic candidates to be the winners.

modified its December 2, 1998 briefing schedule to allow briefs to be longer in length and to be submitted by 5 p.m. on December 4, 1998 and for supplemental briefs due on December 7, 1998.[2] At the hearing an oral motion was made by Respondents Gutierrez and Bordallo for the Court to recuse itself. The Court denied the motion orally at the December 9, 1998 hearing and incorporates its ruling herein by reference.[3]

I. ABSTENTION:

Respondents assert that this is a proper case for abstention. Abstention is a "extraordinary and narrow

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[2] Defendants Gutierrez and Bordallo objected to the Court's briefing schedule set on shortened notice. The Court overrules their footnoted continuing objection on several grounds. First, this lawsuit comes as no surprise given the storm of publicity resulting from the difficulties encountered in the tabulation of votes and the certification of the results by the Guam Election Commission. In fact, the counsel for the Guam Election Commission had already been researching the Organic Act issue presented in this lawsuit. And, there is evidence that counsel for the Democratic candidates had been involved in this matter since difficulties were encounters [sic] with certification. Second, the Court did make allowances for counsel to adequately research and brief the matters presented herein. Briefly stated, counsel were allowed longer briefs and an opportunity to supplement their original briefs after additional time to perform research and after exchange of the initial briefs. Finally, the page limit for briefs did not include attachments to the briefs. Third, this matter needs to be resolved quickly before additional actions are taken which may further complicate matters, such as but not limited to, the swearing in of the Democratic candidates.

[3] A copy of the Court's oral ruling is appended hereto.

exception to the duty of a district court to adjudicate a controversy properly before it." There are two different abstention doctrines invoked here, "*Younger* Abstention" and "*Colorado River*" abstention. "*Younger* Abstention" is primarily interested in comity. *Younger v. Harris*, 401 U.S. 37 (1971). The cases involving *Younger* are primarily concerned with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. *Id.* at 44. Abstention under *Younger* is appropriate only where a court can answer all of the following questions affirmatively: "first, do the [relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

At the time of filing, there was no ongoing state proceeding, thus *Younger* abstention is inapplicable. For the purposes of determining whether a state proceeding is "ongoing" the courts often look to the date of filing. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). As of the time of the filing of this case, there was no ongoing process in the local court. The suits were filed on the same date in both federal and local court (the local suit was filed an hour and a half after this case was filed). The federal court has begun proceedings on the interpretation of a federal question. The local court has not proceeded; it was conceded at oral argument that as of the time of oral argument, the case had not yet been assigned to a Superior Court judge. As of late in the day Monday,

December 7, after this Court's hearing, the case was assigned to a judge.[4] A scheduling meeting has been scheduled for approximately five hours from now. The local case focuses on interpretation of local law and allegations of voting irregularity, not the federal question. Therefore, the first question is answered in the negative. The court need not go further to determine that *Younger* abstention is improper.

The second prong is not as clearly in favor of local interest as it might appear. It cannot be doubted that a local election implicates local interest. However, it cannot be doubted that when a federal court limits itself to interpreting a statute of Congress, overriding federal interests are implicated as well. The Court purposefully limits the scope of its analysis at this time out of respect for territorial interests. Therefore, at this time, the second prong of *Younger* does not favor respondents.

However, it must be noted that the third prong of the *Younger* analysis is also answered in the negative. There is no guarantee that constitutional questions would or could come to light in local court. There is no guarantee that this Organic Act question would be answered or that the local court will not be challenged as to its jurisdiction to decide the Organic Act question. There are numerous procedural barriers that could be set forth. However, at this time, no opportunity to air constitutional concerns

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[4] It should be noted that the entire Supreme Court of Guam was appointed by the Real Parties in Interest, and all of the judges of the Superior Court were appointed either by the Real Parties in Interest or by Petitioner Ada in his prior administration.

has been provided. This court is now in a position to do so and would be remiss to rule otherwise.

Colorado River abstention arises out of an interest to avoid the duplication of litigation. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). It derives, not out of comity, but out of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 817. Here, there is absolutely no duplication of litigation. This case has barely proceeded past filing in local court. In contrast, this court has analyzed the complaint, determined the federal issue presented, received specific briefing on the dispositive issue, has held a hearing and is prepared to rule. Abstention would be most improper at this time.

The abstention doctrine discussed herein does not ask a federal court to abstain from every election dispute. In some cases, it is appropriate to exercise jurisdiction in local election cases. The case of *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) is instructive in this regard. In that case, the federal court was not made to abstain in the face of simultaneous local court proceedings on the local election. The wholesale fraud in the election rendered federal court involvement appropriate; "a federal plaintiff may pursue parallel actions in the state and federal courts so long as the plaintiff does not seek relief in the federal court that would interfere with the state judicial process." *Marks v. Stinson* at 884. At this time, the Court confines its ruling on the Organic Act issue. Such a limited ruling will not interfere with the local judicial process. As elucidated *infra*, this Court defers ruling on the allegations of wholesale fraud in this election at this time, preferring to take

them up if the local apparatus proves unable to address the allegations. *See* note 5.

Most importantly, however, distinguishing this Guam election from the typical state election is the fact that in the usual state election, there is no federal statute in issue. The local interest is strong in this case, but federal interest counterweighs that interest in the need to consistently interpret a federal statute, the Organic Act. In contrast, the companion case in local court is primarily concerned with Guam Election Law. The local interest in the outcome of its election is powerful. But the local interest in interpreting a federal statute cannot be more compelling than that of the federal court interpreting a federal statute.

II. WRIT JURISDICTION:

This court may provide relief in the form of a writ of mandamus. The All Writs Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of the law." 28 U.S.C. §1651. Judicial power under the All Writs Act is properly invoked only in extreme or extraordinary circumstances. *Clark v. Busey*, 959 F.2d 808 (9th Cir. 1992); *California Energy Commission v. Johnson*, 767 F.2d 631 (9th Cir. 1985) (injunctive relief under the All Writs Act was unavailable where irreparable harm showing was found to be speculative). In order for a court to entertain a request for issuance of mandamus, it must possess an independent source of jurisdiction. *Lights of America, Inc., v. United States District Court*

for Central District of California, 130 F.3d 1369 (9th Cir. 1997). The provision in question states:

> If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. §1422. This court possesses an independent source of jurisdiction because the question before the court is a federal question regarding the interpretation of a federal statute, specifically, "Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress," the Organic Act of Guam, 48 U.S.C. §1422. The question before the court is whether a majority of the votes cast went to any one candidate. Therefore the question is federal in nature, requiring the interpretation of a federal statute. Thus the court has within its jurisdiction the ability to provide relief in the form of a writ of mandamus.

Mandamus relief is the proper remedy in cases where an election commission has already certified the results, thus leaving nothing to enjoin. *Democratic Party of the Virgin Islands v. Board of Elections, St. Thomas-St. John*, 649 F.Supp. 1549 (D. V.I. 1986) (writ of mandamus issued). Mandamus had been found to lie in a court with jurisdiction on behalf of a candidate for office to compel a runoff between himself and the candidate receiving a plurality of the vote where an election officer's failure to order a runoff violated a duty imposed by law, and no adequate remedy at law existed. *Estrada v. Adame*, 951 S.W.2d 165 (Tex. App. 1997) (a "majority" voting case under Article

II, §11, of Texas Constitution). Mandamus will lie in order to expunge a decision which an election board lacks the jurisdiction to enter. *Johnson v. Theis*, 669 N.E. 2d 590 (Ill. App. Ct. 1996). "Mandamus is only available when (1) plaintiff's claim is clear and certain; (2) duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Leon Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998). This case is proper for consideration for a writ of mandamus. It involves a complaint lodged after the issuance of a certification by an election commission. Petitioner's claim is clear and certain; it asks for this court to interpret the term "majority of the votes cast." The duty upon the election commission is ministerial in nature, as it does not permit certification absent the majority set forth above. Finally, there is no other adequate recourse for complainants to receive interpretation of a federal statute. For all of these reasons, issuance of a writ of mandamus may be secured from this court.

At this time, the Court will restrict its order to the sole issue of the Organic Act interpretation. Federal courts generally have a very limited place in election disputes because the court system and the party machinery of a state are presumed to be the better apparatus for litigating such disputes. However, a significant exception exists to this principle.[5] Federally protected rights are

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[5] Federal law is replete with cases involving federal court involvement with local elections in extreme circumstances. Where the state's school board refused to follow Supreme Court pronouncements, federal district courts may issue injunctive relief against state machinery to effectuate the purposes of the Supreme Court. *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958)

implicated when the entire election process, including the state's administrative and judicial corrective process, fails on its face to afford fundamental fairness. *Pearl v. Leahy*, 1988 WL 168561 (S.D.Fla. 1988). The case of *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986) reiterated that there can be "patterns of state actions that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote," over which federal courts may exercise jurisdiction. *See also Thompson v. Woodall*, 819 F.2d 1052 (11th Cir. 1987). Though the Court now restricts this ruling to the isolated issue of interpretation of the Organic Act, the Court defers rather than rejects ruling on the other aspects of the election. If the territory's administrative and judicial corrective process timely and sufficiently addresses other questions and discrepancies of the election, thereby affording fundamental fairness to the voters of this territory, further intervention of a federal court should not prove necessary. If it does not, then,

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(school busing). In other cases, federal courts have acted in the absence of action from other quarters. In *Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993), the Eleventh Circuit held that a district court could intervene in a local election matter when it appeared that the local courts would not do so in a timely or efficient fashion. "Once it is apparent that a state court, through no fault of the district court, will not develop a redistricting plan in time for an upcoming election, Growe [*Growe v. Emison*, 507 U.S. 25 (1993)] authorizes a federal district court to go ahead and develop a redistricting plan." Further, the federal court's pronouncement is thereafter of *res judicata* effect. *Wesch* 6 F.3d at 1473. Finally, the case of *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), reminds us that if the election process itself reaches the point of patent and fundamental unfairness, "a federal role is appropriate." *Griffin* 570 F.2d at 1077.

this Court will intervene. It should be noted, however, that this Court's ruling on the issue of the interpretation of the Organic Act has *res judicata* effect. *See* note 5.

Respondent Horecky argues that 28 U.S.C. §1361[6] limits the issuance of mandamus under §1651 to only federal employees. This is incorrect. This section was intended only to ease the burden of proceeding against officers and employees of the federal government who previously were only amendable [sic] to suit in the District of Columbia. *Jarrett v. Resor*, 426 F.2d 213 (9th Cir. 1970). it simply allowed all federal courts to issue mandamus rather than only the District Court for the District of Columbia, and did nothing to minimize the power of district courts to issue mandamus in other contexts.

Respondent Horecky goes on to state that "[a] federal district court has no general mandamus jurisdiction to compel action by state officials," citing *Bermudez v. Chargualaf*, Civil Case No. 97-00023 (Order May 20, 1997) (D. Guam) for this proposition. This is a misreading of that case. In *Chargualaf* this court rejected a request for mandamus under 28 U.S.C. §1361 precisely because Bermudez sought relief against territorial officials, not federal officials. Thus, it was improperly asserted. Here, no one is asserting §1361 as a basis. Furthermore, this case is

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[6] 28 U.S.C. §1361 reads:

> Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

within this court's jurisdiction to issue mandamus because it is a federal question based on the interpretation of a federal statute. It clearly lays within the Court's powers to issue writs under 28 U.S.C. §1651.

Next, Respondent Horecky argues that plaintiffs have an adequate means, such as direct appeal, to attain the relief desired, citing *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d 1346 (9th Cir. 1996).[7] Under the All Writs Act, the party seeking relief must have no other adequate remedy available. Respondent Horecky has stated that since the plaintiffs could have also sought mandamus in Superior Court, this is an "adequate means, such as direct appeal," available to them, thus divesting this court of jurisdiction. Notwithstanding the three-part analysis necessary, his assertion is legally untenable. As this court has stated, *supra*, mandamus is only to be used in extraordinary circumstances. It is to be used when direct appeal is unavailable. The suggestion of the use of mandamus on the local level is a concession that no direct appeal is available. Thus, this serves as an endorsement of the court's use of its mandamus power. Finally, nothing in the three-part *Younger* analysis precludes the federal court from exercising its lawful authority just because similar power may be vested in another court.

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[7] However, the *Apusento Gardens* case addresses the writ jurisdiction that this court exercised when it was the appellate court for the Superior Court of Guam under §1424-3 of Title 28. (Because there is a sitting Supreme Court of Guam, this Court no longer exercises appellate jurisdiction; *Apusento Gardens*, addressed this Court's appellate jurisdiction only.)

III. FOURTEEN DAY ISSUE:

Respondent Horecky argues incorrectly and illogically that this Court lacks jurisdiction because it is fourteen days past the election. Under 48 U.S.C. §1422 a "runoff" election shall be held on the fourteenth day after the election if a majority is not secured. He reasons that since it is now past November 17, 1998, this Court is divested of jurisdiction. This argument is totally unpersuasive. It was the Guam Election Commission which delayed certification for fourteen days. The fourteen days is not an obligation imposed on anyone but the Guam Election Commission. Until such time that the certification issue was finally decided upon, the issue was unripe and thus would not have been properly before this Court. Indeed, it is absurd to argue that Congress intended for the jurisdiction of this Court to be placed in the hands of a local election commission.

The plain meaning of the statute must surely be that, automatically, when a majority is not found, the Guam Election Commission shall conduct an election in fourteen days. This Court's view is in complete agreement with the court in *Estrada v. Adame*, 951 S.W.2d 165 (Tex. App. 1997), where the court issued mandamus for a runoff election though the complaint was filed eight days after the election, and though the pertinent statute directed that runoff shall be had five days after the election. The court saw no impediment, or duty upon anyone but the Texas election commission, and ordered the new election within thirty days. *Id.*

The Court declines to accept the "mechanical" reading of the Organic Act propounded by Respondent

Horecky. Theoretically, taken to its extreme, partisan members of the Guam Election Commission could intentionally delay certification of the election until the fifteenth day after the election and then claim that any contest was too late. Surely the law was not intended to operate in this most unfair way.

Respondent Horecky's argument for waiver is similarly weak and uncompelling. He asserts that the failure to sue in fourteen days constitutes waiver and then goes further to argue that Petitioners failed to pursue administrative remedies. This argument is completely circular. There is no administrative remedy to be had. As Respondent Horecky in the same brief later states, the commission has no authority to investigate the legality of votes.[8] Furthermore, the "majority" issue had already been decided by certification. Therefore, the administrative process was complete.

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[8] The Court does not agree with this assertion. *See* 3 G.C.A. §2106, granting the Guam Election Commission significant powers:

> §2106. Same: Powers of Commission. The Commission shall have the power to summon the parties to a controversy pending before it, issue subpoenas duces tecum and otherwise to take testimony in any investigation or hearing pending before it and delegate such power to any officer. Any controversy submitted to the Commission shall be tried, heard and decided within fifteen (15) days counted from the time the corresponding petition giving rise to said controversy is filed. The Commission shall have the power to certify to the Superior Court of Guam for contempt.

IV. THE "MAJORITY" ISSUE UNDER THE ORGANIC ACT:

The central question is whether a runoff is required under the Organic Act because a candidate did not receive the requisite majority. Counting all ballots cast as noted by the election commission, the Democratic candidates did not receive a majority. However, the record shows that the election results were certified on the basis of Guam Election Commission Legal Counsel's legal opinion that the Election Commission should not count the "blank" ballots, that is, ballots which did not mark either the Democratic candidates or the Republican candidates. If the blank ballots are not counted, the total number of votes cast goes down to 47,353, and the 24,250 votes received by the Democratic candidates is a majority, justifying the certification by the Election Commission of the results. It should be noted that in two prior elections, the blank ballots were counted in the total number of votes cast.

The issue is whether the Election Commission should have counted or not counted the blank ballots. If they are to be counted, a run-off would be required. If they are not to be counted, not taking into account the other irregularities of the election, the Democratic candidates would have been properly declared winners of the election.

A. Guam Election Statutes:

Real Parties in Interest's first argument is that Guam election statutes address the casting of blank ballots and resort to other law is not necessary. The Court must

evaluate whether local law answers the Organic Act question whether blank votes should be counted. The Court finds such an analysis helpful but not binding on the interpretation of federal law.

First, opponents cite 3 G.C.A. §9135, "Indicating Vote," which provides:

> In voting, the voter shall place the appropriate mark in the voting square adjacent to the name of any nominee for whom he intends to vote or shall vote for a candidate or person whose name is not printed on the ballot by writing a name for that office in the blank space left therefor, and by placing a mark in the adjacent voting square.

But the Court finds that this statute only tells one how to vote. It does not tell the voter, or the Election Commission, that if he does not fill in a blank as indicated that ballot will be void (as in *City of Inglewood, infra*). It does not say anything about improper intent. It does not address overvoting (more than one candidate), undervoting (no candidate), the legal effect thereof, or the disposition of the ballot.

Petitioners' opponents next refer to 3 G.C.A. §9145, "Cancellation of Ballot Received but Not Voted," which provides:

> Every voter who does not vote the ballot delivered to him shall, before leaving the polling place, return it to the member of the precinct board having charge of the ballots who shall immediately cancel and return it in the same manner as spoiled ballots.

Again, the Court finds that this does not address whether the Election Commission should count blank ballots. This merely instructs a voter that if he does not intend to vote, he is to return the ballot to the precinct worker. The act of placing the ballot in the ballot box distinguishes this voter from the non-voter, who merely returns the ballot. This section is of no assistance to Real Parties in Interest, but supports a view that a ballot placed in a ballot box, not otherwise void, has a legal effect.

Respondents cite §11111 of Title 3 G.C.A.:

> §11111. Imperfectly Marked Ballots Void. At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

This context of this law clearly shows that this section addresses whether to count a ballot which is imperfectly marked, not marked well, or marked by the handicapped or infirm voter such as a voter with Parkinson's disease.

Respondents' and Real Parties in Interest's argument under this statue is appealing, but proponents have failed to direct the Court to any provision clearly addressing overvoting and undervoting, though these terms are familiar to all election commissions. Surely, if intended to be of no legal effect, all ambiguity could have been removed by the use of such terms. For example, the Code anticipates the use of distinguishing marks on a ballot, and explicitly invalidates such ballots. No similar code provision exists for overvotes or undervotes and none

shall be read in by this Court when the local legislature has seemingly covered the field.

There is no indication that this statue should be interpreted for the larger issue of overvoting and undervoting. Further, the ordinance containing voting instructions in the *City of Englewood* case, *infra*, was specifically addressed to the voter and explained to the voter directly the legal consequences of this act.

The Court in finding that the Election Commission operated outside of its jurisdiction looks to 3 G.C.A. §11136, which states:

> Review of Ballots. The Commission shall not review any ballots except as permitted on a recount.

Here, the record of the Guam Election Commission proceedings clearly shows that this Commission acted not in a ministerial capacity but in an adjudicative capacity in violation of 3 G.C.A. §11136 when it re-classified votes that had been included in the totals as votes that were void for all purposes. This Court will not permit such action.

Respondent Horecky cites *City of Englewood v. Kew*, 132 P. 780 (Cal. 1913) for the proposition that if a ballot is not expressive of a wish, which under the law, can be given effect, such person has not voted. *Accord Covina Union High School District v. McClellan*, 228 P. 409 (Cal.App. 1924). However, this is an overbroad reading. *Kew* and *McClellan* were bond issue cases. In *Kew*, an ordinance was passed setting forth the time, place, and manner of election. *Kew*, 132 P. at 781. It included instructions therein to voters: "To vote for a proposition stamp a

cross in the blank or voting square. . . . All marks except the cross are forbidden. All distinguishing marks or erasures are forbidden and make the ballot void." *Id.* at 782. (Emphasis added). The specific directions of the ordinance have a mandatory effect, and a disregard thereof renders the vote nugatory. *Murphy v. San Luis Obispo*, 51 P. 1085 (Cal. 1898). Here, we have no such mandatory clause. Under 3 G.C.A. §9135, a "voter shall place the appropriate mark in the voting square adjacent to the name of any nominee for whom he intends to vote . . . ". Note that there are no legal consequences indicated. There is no direction under the laws of Guam removing meaning from the vote. Therefore the local statute does not foreclose giving effect to a blank ballot or overvoted ballot as it may reflect the intent of the voter.

B. Case Law:

The Guam Election Commission relief on the case of *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). In that case, the Third Circuit entertained immediate appeal of the District Court of the Virgin Islands order requiring a run-off election for Governor and Lieutenant Governor. In *Todman*, the Third Circuit reversed the District Court of the Virgin Islands and held that in determining whether the apparent winners received a majority, it was not proper to count blank ballots or ballots that were blank as to Governor and Lieutenant Governor. In so holding, the Third Circuit relied on a Virgin Islands District Court case, quoting from it the long standing holding that voters not attending the election are deemed to have

acquiesced to the will of the voting majority.[9] The case relied upon, however, is not so clear on this issue.

The Third Circuit in *Todman v. Boschulte* took its short holding directly from the Virgin Islands district court case of *Euwema v. Todman*, 323 F.Supp. 167 (D.V.I. 1971), but a closer examination of *Euwema* reveals surprising inconsistencies which compel this Court to reject *Todman* as precedent. The issue in *Euwema* involved a referendum: Congress had amended the Virgin Islands' Organic

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[9] It is not argued that the majority must be comprised of all qualified electors, as has been argued in other election cases. This is well settled: one who fails to vote cannot be counted in determining the majority requirement:

> It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections." *Cashman v. Entwistle*, 100 N.E. 58 (Mass. 1912).

See Heuchert v. State Harness Racing Commission, 170 A.2d 332 (Pa. 1961). This does not address, however, whether one's blank vote is counted, which is at issue in this Order. The Court rejects Respondent's argument that *County of Cass v. Johnston*, 95 U.S 360 (1877), makes clear that one does not distinguish between one who does not go to the polls and one who goes and casts a blank ballot.

Act, 48 U.S.C. §1542, "Voting franchise; discrimination prohibited" in 1970 by adding subsection (b) which allowed the voters of the Virgin Islands to lower the voting age from 21 to 18 by approving it in a referendum "held for that purpose." Thus, the election at issue in *Euwema* was a special election by law. However, the ballot on lowering the voting age was presented to the electorate in the general election, though on a separate ballot. The issue was whether a majority of those voting *on the referendum* would be required to pass the referendum, or those voting *in the general election*. The District Court prefaced its opinion with the statement: "[t]he question presented here is not . . . whether a blank ballot should be tallied as an affirmative or a negative vote on a given proposition." *Id.* [emphasis added]. The issue was which majority to use in tallying the results of the referendum only. In deciding the case, the Virgin Islands district court acknowledged cases from other jurisdictions, stating that "despite one or two holdings to the contrary, it is settled law that 'the proposition is not carried by a majority of votes cast unless such majority is also a majority of all votes cast at the election,' " quoting 26 Am.Jur.2d §311, *Thurston County Farm Bureau v. Thurston county*, 287 N.W. 180 (Neb. 1939), *Stembridge v. Newton*, 99 S.E.2d 133 (Ga. 1957), *Allen v. Burkhart*, 377 P.2d 821 (Ok. 1963), and *State ex rel. Blankenship v. Gaines*, 241 P. 12 (Wash. 1925). However, the district court distinguished those cases from the voting age referendum before it by referring to the Congressional measure which allowed the vote in the first place: the measure unequivocally dictated that the voting age referendum be presented to the people in a *special*

election: "in a referendum election held for that purpose." It was not supposed to have been presented to the electorate in a general election. Because of this factor alone, the District Court of the Virgin Islands held that it had authority to sever the special election from the general election. Therefore, the court was at liberty to deviate from the principle that all votes cast must be counted. A special election was by necessity deemed held inside a general election. In holding that a majority had passed the measure, the Virgin Islands District Court enunciated the principle that it would not consider the votes of those who did not submit a ballot, stating that voters "not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting." This merely reiterates the long-standing principle that a majority vote requirement does not require the entire electorate, but only those voting (*see* note 9). The Virgin Islands district court in that case did *not* hold that blank ballots should not be counted. It held that it would count only those ballots cast by the voters participating in the so-called special election. But *Euwema* means, by implication, that if the question had been a part of the general election, all votes would have to be used to calculate the majority, not just the votes cast on the proposition at issue.

Yet, from this statement, the Third Circuit in *Todman* interpreted that the Virgin Islands District Court held that blank ballots were not to be counted. However, this is obviously not the holding of the *Euwema* case. It was not even the issue in the *Euwema* case. The *Todman v. Boschulte* case rests on most insecure footings.

Aside from the fact that the Virgin Islands case upon which the Guam Election Commission relied on in certifying the results rests on a most shaky foundation, the Court is also very reluctant to align this territory with a region that has suffered a long history of contested elections. The Virgin Islands suffers a disturbing history of election disputes. *See Brown v. Hansen*, 973 F.2d 1118 (3rd Cir. 1992), *Stapleton v. Board of Elections, St. Thomas-St. John*, 821 F.2d 191 (3rd Cir. 1987), *Markoe v. Legislature of the Virgin Islands*, 592 F.2d 188 (3rd Cir. 1979), *Williams v. Todman*, 367 F.2d 1009 (3rd Cir. 1966), *Canton v. Todman*, 367 F.2d 1005 (3rd Cir. 1966). To Guam's pride, elections have historically proceeded with civility in this territory, lacking significant history of election contest. The fact that one election has emerged with problems remains to Guam's credit, that there is no extensive history to draw upon. The history of Virgin Islands election contest cases is not one that is attractive for this Court to rely upon.

Most importantly, as initially appealing as it is to look to a fellow territory for law, especially a case which interprets a similar or identical Organic Act provision, it is unnecessary because there is persuasive authority for this territory closer to home. The Court initially looks at the case of *People ex rel. Smith v. City of Woodlake*, 106 P.2d 71 (Cal.App. 1940), where a California court of appeals addressed this issue squarely, holding that the phrase "majority of the votes cast" meant that even abstentions must be counted if a ballot is submitted. In that case, in an election on whether a municipality could be incorporated, 171 ballots were cast in favor of incorporation, 163 ballots were cast against, and 9 ballots were cast which expressed no choice on incorporation, but cast votes on

the other matters presented on the same ballot. It was held that "it is the general rule that when a proposition is required to carry by a majority of votes cast at a certain election the proposition must receive the favorable vote of a majority of all votes cast." The court held that because 343 votes were cast, the majority would have to earn half of 343, or 171.5. (A majority is not 50% plus one, it is simply more than 50%. As long as more than half the number of voters is earned, a majority is earned. *Pruitt v. Zbranck*, 722 S.W.2d 142 (Tex.App. 1986) (holding that it was not necessary that the candidate receive at least one whole vote in excess of half the number of votes cast)).

The *City of Woodlake* case relied on *People ex rel. Wells v. Town of Berkeley*, 36 P. 591 (Cal. 1894), which held that the term, "majority of electors voting at a general election" was to be taken literally – that all voters' votes are counted in determining a majority. In so holding, the California Supreme Court reasoned that "these words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required." This case was followed by the California Supreme Court again in the case of *City of Santa Rosa v. Bower*, 75 P. 829 (Cal. 1904), a case which held that if a question is presented to the electorate at a general election, to find a majority of those voting, all voters' ballots must be considered. And, in *Law v. City and County of San Francisco*, 77 P. 1014 (Cal. 1904), the Supreme Court of California yet again affirmed the principles in *City of Woodlake*.

More recently, the case of *People ex rel. Rowe v. West Side County Water District*, 246 P. 2d 119 (Cal.App. 1952),

the California appellate court declined to conclude that the measure before the voters passed because of 490 votes, 242 were in favor, 241 against, with seven abstentions. The court ruled that the winner would have to have earned 245 votes because all 490 votes would be considered. The Court said simply, "if the legislature had intended to authorize the formation of a county water district upon a favorable majority of the votes on the proposition rather than upon a favorable majority of the votes cast at the election it would have been a very simple matter to say so in concise terms."

With authority in our backyard, it is questionable whether resort to Virgin Islands law is necessary. The Court's predisposition to California law is well rooted in Guam law: "This Court has recognized that where Guam law is unclear, California cases 'are persuasive.' *Roberto v. Aguon*, 519 F.2d 754 (9th Cir. 1975), *See Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979)," *People of the Territory of Guam v. Borja*, 732 F.2d 733, 735 (9th Cir. 1984).[10] Most important is the fact that these very California cases were available to those involved with the passage of the Organic Act measure in question. These cases were on the

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[10] This principle had its origin in the case of *United States v. Johnson*, 181 F.2d 577 (9th Cir. 1950), which held that "when the appropriate authority adopted form California a code of laws designed to replace the original part-Spanish law, it might be inferred that such codified rules . . . were intended to have the same significance and scope as they had been given by the Supreme Court of the State from which the code was taken." *Id.* at 580. In this case, we do not have a California Supreme Court pronouncement on an identical statute, we have a California Supreme Court pronouncement on identical language, "majority of votes cast."

books in 1950 when §1422 was enacted by the United States Congress, and anyone would have known exactly what the term "majority of votes cast" meant by resort to the case law as it existed at that time. As noted by counsel for Real Parties in Interest, Congress is deemed to have followed relevant statutory interpretations rendered before a statute was passed, unless the statute makes clear that a different interpretation is required. *Morrisette v. United States*, 342 U.S 246 (1952). Resort to later cases from unrelated circuits is inappropriate.

The Court acknowledges the Hawaii cases cited by counsel, but the Court does not find them persuasive. The case of *Republican Party of Hawaii v. Waihee*, 709 P.2d 980 (Haw. 1985) is cited for the proposition that blank ballots are not counted in elections in the state of Hawaii. The *Waihee* case held that blank ballots were not to be counted in determining a majority of voters on a constitutional provision. The *Waihee* case relied on the *Todman v. Boschulte* case, which this Court has rejected as infirm, resting on plainly inaccurate grounds. But the Hawaii Supreme Court declined to follow *Waihee* in the later case of *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997), where the Hawaii Supreme Court stated clearly "we hold that 'ballots cast' within the meaning of [the Hawaii constitution, the "equivalent" of our Organic Act] includes blank ballots and over votes." Counsel argues that this holding is to be distinguished from *Waihee* because the statute under consideration was compellingly different. It is of no consequence to this Court; even if the Court were to follow Hawaii law, a proposition for which there is no legal precedent, the Court would still count blank ballots.

In the face of obviously conflicting authorities on this elusive issue, the Court is guided by the principle on which this territory has historically resolved its legal issues: the principle of *stare decisis* as enunciated in the *Johnson* case and its progeny. The Court chooses to align itself with the Supreme Court and appellate court decisions of the state from which our laws come, California. No compelling reason has been presented to do otherwise.

Indeed, one court has gone so far as to say that when not all voters vote on an issue, the majority simply cannot be determined. When the issue of whether a majority has been cast is indeterminable, a reelection is necessary. The case of *Greenberg v. Martini*, 339 A.2d 242, 276 (N.J. 1975), held "that in the event any doubt should exist, it should be resolved in favor of requiring an actual majority whenever such can reasonably be determined." Considering the other irregularities surrounding this election, (which this Court declines at this time to address), it can safely be said that it is unclear whether a majority elected the Democratic candidates in the general election on Guam on November 3, 1998.

"Properly qualified voters may not be disfranchised except by their own wilful or deliberate act." *Oviatt v. Behme*, 147 N.E.2d 897 (Ind. 1958). If someone bothers to appear and submit a ballot, there is no authority presented to this Court that that ballot should not be counted. " 'The suffrage is regarded with jealous solicitude by a free people.' " *Bowers v. Smith*, 20 S.W. 101 (Mo. 1892) overruled in part on other grounds 55 S.W. 866 (Mo. 1900). The rule of majority is so much a part of our political system, it should not be denied unless the law so

provides. *Rathjen v. Reorganized School District R-11 of Shelby County*, 284 S.W.2d 516 (Mo. 1955). The law does not clearly provide that the blank ballots should not have been counted. A runoff is required.

The Court understands the arguments of Guam Election Commission members and of the Democratic candidates that as a practical matter, it does no good to order a runoff between the only two candidates which were on the ballot in the first place. They argue that common sense dictates that runoffs were designed for the situation whether there are two top winners of three or more candidates. The Court rejects this otherwise appealing argument for three reasons: (1) The Guam Election Commission did not identify the recipient of the 1219 write-in votes. Perhaps one candidate received all 1219, and if so, logically, these are the top two of three candidates, and a runoff is necessary. (2) More importantly, this Court has been asked to direct the Election Commission to follow a law that the winner of the gubernatorial race receive a majority. The Guam Election Commission certified a race in which the Democratic candidates received 49.82% of the vote and the Republican candidates received 43.56% of the vote, with other candidates receiving 2.65% of the vote. This was the actual report of the General Election, Exhibit 1 to Petitioner's Petition. The Election Commissioners who voted in favor of certification report that they adopted "only column three" of the first page of Exhibit 1, the column showing that the Democratic candidates received 24,250 votes and the Republican candidates received 21,200 votes, and write-in candidates received 1294 votes. They rejected Column Four, which

showed the percentages. Apparently, the zealous Commissioners simply changed the numbers and then certified the election, believing they had support in law to do so. The Court finds otherwise.

This Court is asked to support certification of a result of an election by an election commission which the law simply does not support. The Election Commission certified the Democratic candidates as winners despite receiving 49.82% of the vote. The Court understands that the Democratic candidates were only 83 votes short, and there is no joy in throwing this territory into turmoil, but is this Court to simply ignore the law? To say it was close enough, why worry about the extra few votes is unacceptable. The law does not authorize a casual approach. The Organic Act requires a majority.

The final reason the Court rejects the argument that a runoff is inappropriate when there are only two candidates is that the requirement of a majority is not usually an issue when the election is not close. One would hardly see this dispute if the election results were 70%-30%. The requirement of a majority is important in precisely this situation, where the election is very close, when the results are otherwise extremely unreliable.[11] The requirement of a majority is a built-in safeguard against petty

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[11] The Court now defers exercising jurisdiction over the other allegations in the Complaint, i.e., 68 precincts reported tabulations that did not match, the transportation of ballots in personal, unaccompanied vehicles, 151 voters with the same social security number voting, hundreds of aliens voting, power outages while electronically counting ballots, votes of non-residents, solicitation of absentee ballots from the hospital on the day of the election, a delay of several days before write-in ballots were counted, during which time the write-in ballots

fraud in a close election, where a small amount of fraud can make an enormous difference. In that case the exact calculation of a majority is all the more important.

The duty imposed under 48 U.S.C. §1422 is on the Guam Election Commission, not on the unsuccessful candidate. The drastic issuance of mandamus is to correct a wrong done by those under a duty to call the re-election. The Guam Election Commission certified the election and a winner with less than fifty percent of the vote. It did so beyond its jurisdiction. Thus, the act was void. The case is now before this Court to correct the Guam Election Commission and direct it to follow the law.

The writ of mandamus issued in this case shall extend to all persons and agencies necessary to conduct the run-off election. The power to issue a writ of mandamus may extend, under appropriate circumstances, to persons who might not be parties to the original action or who may have engaged in wrongdoing, but are in a position to frustrate the implementation of this Court's order or the proper administration of justice. *United States v. New York Telephone Company*, 434 U.S. 159 (1977). Therefore, this mandate shall extend to all individuals and instrumentalities as required by the Guam Election Commission to conduct the runoff election.

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were left unguarded on several occasions, etc. The Court reserved jurisdiction over this issue in the even the episodic events rise to the level of systematic denial of an individual's vote, which would permit this court to further intervene *per Thompson v. Woodall*, 819 F.2d 1052 (11th Cir. 1987). As matters now stand, there is insufficient evidence of coordinated voter fraud or that fraud permeated this entire election.

The Court contemplates that the runoff election will he ordered to be held in a shorter time period that is stated in the Organic Act, nine rather than fourteen days. In doing so, the Court looks to the case of *Clark v. Roemer*, 750 F.Supp. 200 (M.D.La. 1990) (district court accelerated the election based on time and cost constraints "in light of the public interest in having elections proceed"), *vacated by Clark v. Roemer*, 501 U.S. 1246 (1991) (on broader ground of discrimination and dilution of votes). This Court, too, would like to accelerate the election for reasons of time. The years's end is approaching, with inauguration to immediately follow on January 4, 1999. The Court determines that it is in the territory's best interest to have the election behind them as soon as possible, to have this behind us. For this reason,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Guam Election Commission shall hold a runoff election as referred to in §1422 of the Organic Act. The runoff election between the Democratic and Republican gubernatorial candidates shall be held on Saturday, December 19, 1998.

SO ORDERD this 9th December, 1998.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

Notice is hereby given that this document was entered on the docket on 12/9/98. No separate notice of entry on the docket will be issued by this Court.

Mary L. M. Moran
Clerk, District Court of Guam
By: /s/ Illegible 12/9/98
Deputy Clerk Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; et al., Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC# CV-98-66-JSU Guam ORDER (Filed Dec. 15, 1998)

Before: TROTT and SILVERMAN, Circuit Judges

Appellants' motion to stay the district court's December 9, 1998 order is granted. *See Todman v. Boschulte*, 694 F.2d 939, 940 (3d Cir. 1982).

Appellants' motion to expedite the briefing and hearing schedule is granted. The schedule is as follows: Appellants' opening brief and excerpts of record are due January 11, 1999; appellees' answering brief is due February 5, 1999; and the optional reply brief is due within 14 days after service of appellees' brief. Requests for extensions of time will be strongly disfavored.

The Clerk shall calendar this case during the week of March 8 in San Francisco.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC No. CV 98-066 ORDER (Filed May 27, 1999)

Before: TASHIMA, Circuit Judge.

Appellants have made a conditional motion for stay of mandate to enable them to prepare and file a petition

for a writ of certiorari with the United States Supreme Court. The motion was conditioned on the denial of appellants' then-pending petition for rehearing and rehearing en banc. That motion was received by the Clerk on May 24, 1999. On May 25, the petition for rehearing and rehearing en banc was denied.

Appellants' motion is granted. Issuance of the mandate is stayed for a period of 35 days (the period requested by appellants), said 35-day period to commence on June 1 and expire on July 6, 1999.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH F. ADA; FELIX P. CAMACHO, Plaintiffs-Appellees, v. GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION, and its commissioners; JOSEPH F. MESA, Commissioner; JOSEPH T. DUENAS, Commissioner; FREDERICK J. HORECKY, Commissioner; DOUGLAS B. MOYLAN, Commissioner; ROSANNA D. SAN MIGUEL, Commissioner; LEONILA L.G. HERRERO, Commissioner, Defendants, and CARL T.C. GUTIERREZ; MADELEINE Z. BORDALLO, Real Parties in Interest-Appellants.	No. 98-17306 DC No. CV 98-066 **ORDER** (Filed May 25, 1999)

Before: NOONAN and TASHIMA, Circuit Judges, and RESTANI, Court of International Trade Judge.*

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* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

The panel has voted to deny the petition for rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Noonan and Restani so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

Title 3 Guam Code Annotated § 11111. Imperfectly Marked Ballots Void. At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

Title 3 Guam Code Annotated § 11114. Only Invalid Portions Rejected. If a voter indicates either:

(a) By placing his marks in the voting squares adjacent to the names of any candidates, or

(b) By writing the names of persons for an office in the blank spaces, or

(c) By a combination of both, the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.

Supreme Court, U.S.
FILED
JUL 30 1999
OFFICE OF THE CLERK

(2)

No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and MADELINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA AND FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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1188

QUESTION PRESENTED

Should this Court exercise its discretionary power to review the Ninth Circuit's decision that the Guam Organic Act (48 U.S.C. § 1422) required a runoff between the gubernatorial slates competing in Guam's 1998 general election where

1) that result is compelled by the statutory language expressly requiring a runoff where neither slate garners a majority of votes cast "at any election;"

2) the purported Circuit conflict cited by petitioners invokes a single Third Circuit decision which interprets a different federal statute governing the conduct of elections in a different territorial jurisdiction;

3) that same Third Circuit decision has little current vitality, as reflected by the fact that no federal court has cited it for the proposition on which petitioners rely since it was issued 17 years ago;

4) the decision below creates no potential for multiple gubernatorial run-off elections; and

5) the decision below is consistent with this Court's precedents?

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INTRODUCTION

Respondents Joseph F. Ada and Felix P. Camacho (hereafter "respondents" or "Ada"), respectfully request that this Court deny the petition for writ of certiorari filed by petitioners Carl T.C. Gutierrez and Madeline Z. Bordallo (hereafter "petitioners" or "Gutierrez") seeking review of the Ninth Circuit's opinion in this case. Though certified for publication, that opinion has yet to be assigned an official citation in the relevant reporter services. It appears as Appendix A to the Gutierrez petition.[1]

REASONS WHY THE PETITION SHOULD BE DENIED

In his question presented and related discussion, Gutierrez implicitly advances two separate arguments in support of his plea that this Court grant the instant petition for certiorari. The first challenges the Ninth Circuit's decision on substantive grounds and primarily asserts that the Court of Appeals misinterpreted the federal statute (48 U.S.C. § 1422) governing Guam's gubernatorial election when it concluded that the statute's requirement of a majority vote "in any election" refers to a majority of the votes cast at the general election of which the gubernatorial election is necessarily a part. Gutierrez also argues that the decision below creates a legal conflict with a single, 17-year-old Third Circuit

[1] This opposition accordingly cites the Ninth Circuit's opinion by referring to the Petition's Appendix ("App.") and its relevant page number.

decision which interprets a *different* federal statute relating to a *different* territorial jurisdiction than Guam, and which *no* other federal Circuit has ever recognized or applied.

The substantive attack on the Ninth Circuit's decision is unpersuasive for the very reasons stated in the Court of Appeals' opinion itself. Specifically, the lower court's conclusion that "votes cast in any election" means all those cast in the general election is the only reading of the statute which gives meaningful effect to its key provisions. By contrast, if construed as a reference to the gubernatorial election alone, the phrase "in any election" is rendered redundant, in flat defiance of the principle expressed by this Court in *Kungys v. United States*, 485 U.S. 759 (1988). *See* App. at A-9.[2] Similarly, petitioners are unable to explain why, if the statute requires a mere majority of votes cast in a particular race rather than the election at large, it did not simply say so, as does another federal statute (48 U.S.C. § 1712) which petitioners invoked in support of their argument below. *See* App. at A-11 – A-14.

The remaining deficiencies underlying petitioners' substantive arguments, such as their reliance on unrelated provisions of Guam election law and appeals to

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[2] Petitioners' claim that its reading is most logical because the gubernatorial election is the "singular focus of the provision at issue" (*see* Petition at 9) is belied by section 1422's express requirement that the gubernatorial election be conducted as part and parcel of the *general election* at which Guam voters decide several other issues. *See* section 1422, first paragraph, sixth sentence; *see also* App. at A-4 – A-5 (describing other races contested at the general election).

policy concerns, are readily exposed by reviewing the remainder of the Ninth Circuit's opinion. Additionally, as respondents will now demonstrate, petitioners cannot establish the importance of addressing the issue decided below, a failure which should lead this Court to conclude that certiorari is unwarranted.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONERS HAVE FAILED TO ESTABLISH THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10.1, this Court will not exercise its discretionary power to review a United States Court of Appeals' decision on certiorari unless there are "special and important reasons therefor." Indeed, while the Rule states that such reasons *may* appear where, *inter alia*, a Court of Appeals' decision conflicts with that of another Court of Appeals on the same matter (*see* Rule 10.1[a]), or where that Court has decided a question of federal law which has not been resolved by this Court (*see* Rule 10.1[c]), the presence of special and important reasons remain the *sine qua non* of certiorari review.

A. The Respective Decisions Of The Third And Ninth Circuits Interpret Different Statutes Governing Different Jurisdictions And Therefore Do Not Reflect A Circuit Conflict Warranting Intervention By This Court

Gutierrez makes much (Petition at 6-8) of a purported conflict between the Ninth Circuit's interpretation

of the majority requirement under the Guam statute (48 U.S.C. § 1422) and the Third Circuit's interpretation of the majority requirement under a similar statute governing gubernatorial elections in the Virgin Islands (48 U.S.C. section 1591). *See Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). While it is true, as the Ninth Circuit's opinion noted (App. at A-14 – A-15), that the text relating to the respective majority requirements in the two statutes is identical, the fact remains that the statute considered in the case below – 48 U.S.C. § 1422 – and that considered in *Todman* – 48 U.S.C. § 1591 – are *different* statutes governing electoral processes in two *different* territorial jurisdictions, i.e., Guam and the Virgin Islands.

Under these circumstances, Gutierrez cannot found his claim of importance on a Circuit conflict arising from contrary interpretations of a single federal statute having national application. *Compare Shapiro v. United States*, 335 U.S. 1 (1947) (resolving conflict over differing Circuit interpretations of the Emergency Price Control Act). The present issue has apparently confronted the Virgin Islands and Guam one time in their respective histories, and each territory has received a judicial interpretation of its governing election statute which will control the outcome of any future disputes implicating this issue in that territory. The differing territorial approaches to this issue are no less legitimate or tolerable than are the differing "majority" calculations adopted by various state jurisdictions, as are discussed in the opinion below (App. A at A-17 – A-20).[3]

[3] Furthermore, should other Circuits choose to consult the Ninth Circuit's decision and/or *Todman* to assist in interpreting the majority requirement of any *other* federal statutes, this Court would plainly benefit from such further study. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court").

Accordingly, the notion that "future litigation in election cases is virtually guaranteed" in these two Territories unless the "conflict" is resolved (*see* Petition at 15) is meritless. Any gubernatorial candidate in either territory will know that the interpretation rendered by the Circuit within which his or her territory is located controls and is not subject to challenge on the basis of arguably conflicting case law from a different jurisdiction.

B. *Todman*'s Defective Analysis And Frailty As Precedent Diminish The Importance Of Any Perceived Circuit Conflict

Consistent with Rule 10, commentators have correctly observed that a conflict between a Court of Appeals decision and one which has lost all vitality is not an adequate basis for granting certiorari. *See*, e.g., Stern, et al., *Supreme Court Practice* (7th ed. 1993), section 4.4, p. 172, and citations contained therein.

This principle applies here. As the decision below explains, by adhering to a majority calculation that ignores the undervotes, overvotes, and write-ins returned in a general election, *Todman* flatly misinterpreted the single federal decision (*Euwema v. Todman*, 323 F.Supp. 167 [D.V.I. 1971]) on which it was founded. *See* App. A at A-14 – A-17. Furthermore, as the Ninth Circuit also observed (App. A at A-17, n.8), despite the fact that

Todman was decided some 17 years ago, no federal court has *ever* cited it for the proposition on which petitioners rely, a telling measure of its current frailty as relevant precedent.

By contrast, the Ninth Circuit's decision in this case gives effect to both the plain meaning of the relevant statutory language and to the statement of governing principles contained in *Euwema*. Furthermore, by requiring a majority of *general* election participants, it accommodates the statute's implicit concern for ensuring greater legitimacy where gubernatorial elections are involved.[4] Given the soundness of the analysis of the decision below, it should be permitted to stand.

C. The Specter Of Endless Runoff Elections In Guam Is Without Substance

As explained by the Court in *Euwema*, which *Todman* so egregiously misconstrued, a runoff election would constitute a *special*, rather than a *general* election; as such, the slate garnering the greater number of affirmative gubernatorial votes in the runoff would necessarily prevail, regardless of the number of votes expressing no discernible preference. *See* Ninth Circuit's discussion of *Euwema* at App. A-15 – A-17. Notably, section 1422 does not purport to impose its general election requirement of a majority vote on the *runoff* election for which it also

[4] This feature of the decision below also undermines Gutierrez's claim that the present issue warrants review because the citizens of Guam will not understand the Ninth Circuit's disposition, or that the costs of a runoff are too great for its citizenry to bear. *See* Petition at 14-15.

provides. That being so, the specter raised by Gutierrez of potentially endless runoff elections in Guam, should the Ninth Circuit's reading of § 1422 remain in effect, is indeed a fiction.

D. The Decision Below Is Consistent With This Court's Precedent

Finally, Gutierrez suggests (but does not expressly argue) that the writ should be granted because the Ninth Circuit's decision conflicts with this Court's decision in *County of Cass v. Johnston*, 95 U.S. 360 (1877), which he identifies as the source of the *Todman* approach. *See* Petition at 7. As the Ninth Circuit recognized, however, *County of Cass* is inapposite because it held only that qualified voters who do not go to the polls at all should be excluded when calculating a majority, and qualified voters who did not participate in the Guam election were not at issue below. *See* App. A at A-18. In addition, *County of Cass* noted that its holding applied only in the *absence* of a statutory provision to the contrary, which, as the Ninth Circuit correctly found, § 1422 plainly supplies in this case. *See* App. A at A-18. The presence of a conflict between the decision below and this Court's precedent is not an available basis for granting review.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: July 30, 1999

Respectfully Submitted,

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Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

(3)

No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUITIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

v.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Citizens of Guam and the other Territories of the United States have little political voice in their governance compared to the citizens of the several States. Accordingly, they are particularly dependent on the federal courts to protect the limited voting rights that Congress has conferred. The Ninth Circuit's decision has seriously damaged the political rights of the citizens of Guam, disregarded or invalidated Guam's applicable election statutes, and gave no respect to the interpretation and application of Guam's election laws by its Election Commission which is charged with their construction and application. This case is accordingly very important not only to the citizens of Guam, but also to the citizens of other Territories of the United States.

I. THE DECISIONS OF NINTH AND THIRD CIRCUITS CONFLICT

The Ninth Circuit specifically acknowledged that its interpretation of the Organic Act of Guam (48 U.S.C. § 1422) is in conflict with the Third Circuit's interpretation of the identical language of the Organic Act of the Virgin Islands (48 U.S.C. § 1591) in *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). (App. at p. 15.) The conflict does not disappear because the two Acts relate to gubernatorial elections in two Territories.

The Third Circuit held that ballots entirely blank or blank as to the gubernatorial contest should not be counted in determining the "votes cast" for Governor and Lieutenant Governor. The Ninth Circuit disagreed.

The pivot of the Ninth Circuit opinion is its conclusion that the words "in any election" in the sentence beginning "If no candidates receive a majority of votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held . . . " [emphasis added] cannot refer solely to the gubernatorial race, but must include all votes cast in the general election because the emphasized words would otherwise be "a nullity." (App. at p. 9) Based on that conclusion, the Court held:

> We read "votes cast" as including all votes cast at the general election for Congress presumably would not have included the phrase "in any election" if it meant to refer only to the votes cast in the single election for governor and lieutenant governor.

(App. at p. 9.)

The opinion ignores two sentences of the statute in the same paragraph dealing solely with gubernatorial elections that make indelibly clear that Congress intended the words "in any election" to mean votes cast in the initial gubernatorial race in a single election *and* gubernatorial votes in general elections held thereafter:

> The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election.

The Ninth Circuit acknowledged that its construction of the statute would lead to results that Congress did not intend. It tried to avoid the "absurdity" of its construction by substituting the words "ballots cast" for the statutory words "votes cast" and by adding the words "in a

general election" to the sentence dealing only with gubernatorial elections. The Court thereby counted as votes cast in the gubernatorial contest during a general election those ballots on which voters had cast votes for both gubernatorial slates and ballots containing a vote for at least one person in some other race which were blank in the gubernatorial contest.[1] The Court stated in Footnote 5:

> Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately one million votes that were cast for all candidates for the various offices. The absurdity of this result suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast". However, giving effect to the phrase "in any election" in such a way as to

---

[1] If ballots are deemed "votes cast" to determine a majority in the gubernatorial race when the voter marked both slates in that race, the Gutierrez slate would still have won the majority. Six hundred nine persons voted for both gubernatorial slates. Counting these "over votes," 304 votes should be added to the vote total of each slate. As thus counted, the Gutierrez slates received a majority of the votes cast in the November 3, 1998 general election.

> avoid an absurdity is preferable to reading the phrase out of the statute entirely.

No "absurdity" and no surplusage exist if the statute is read as Congress wrote it.

Respondents are mistaken in arguing that *Todman* "has lost all vitality." (Resp. Br. p. 5) Federal appellate opinions do not become senile at the age of 17. Respondents are also mistaken that *Todman* misinterpreted *Euwena v. Todman*, 323 F. Supp. 167 (D.V.I. 1972). *Todman* simply agreed with *Euwena's* statement of the principle that "voters not attending the election or not voting on the matters submitted are presumed to assent to the expressed will of those attending and voting." 694 F.2d at 941. (App. at p. 16.)[2] That statement was based on *County of Cass v. Johnston*, 195 U.S. 360 (1877); it cannot be successfully confined, as Respondents contend, to voters who do not go to the polls at all. Like persons who stay home, persons who do not cast a vote in the gubernatorial race have not expressed their will in that contest and are properly presumed to assent to the expressed will of those who voted in the race.[3]

---

[2] The *Todman* Court did not imply that *Euwena* "compelled" any conclusion for the obvious reason that district court decisions on legal issues do not bind appellate courts.

[3] Respondents' suggestion that the construction of the language should percolate in lower courts before this Court should decide the issues is incorrect. The issue is now ripe and further litigation would waste scarce judicial resources.

II. THE INTERCIRCUIT CONFLICT AND THE ERRONEOUS NINTH CIRCUIT OPINION WILL BREED LITIGATION

Respondents' argument that nonresolution of the conflict will not breed further litigation assumes that participants in hotly contested political races will be less litigiously inclined later than they are now. The prediction is not founded on experience. Moreover, no appellate conflict on the issues existed until the Ninth Circuit decided this case.

Respectfully submitted,

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August 9, 1999

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No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 2, 1999
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In the United States District Court for the District of Guam

12/1/98	Complaint for Declaratory Judgment and Request for Issuance of Writ of Mandamus
12/2/98	Order – Petition for Writ of Mandamus to be argued on December 7, 1998 at 10:00 a.m. Briefs will be accepted from parties who have entered an appearance in this action no later than 3:00 p.m. December 4, 1998
12/7/98	Minute Entry – Petition for Writ of Mandamus – Motion argued by parties. Motion taken under advisement. Proceedings continued to 12/9/98 – 10:00 a.m.
12/9/98	Order and Writ of Mandamus. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Guam Election Commission shall hold a runoff election as referred to in § 1422 of the Organic Act. The runoff election between the Democratic and Republican gubernatorial candidates shall be held on Saturday, December 19, 1998.
12/9/98	Order re motion for a stay pending appeal – Denied
12/9/98	Real Parties in Interests' Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the District Court's December 9, 1998 Order

In the United States Court of Appeals for the Ninth Circuit

12/10/98 Filed appellants Carl T.C. Gutierrez and Madeleine Z. Bordallo's emergency motion for stay of order to hold runoff election pending appeal and to expedite appeal

12/15/98 Filed appellees Joseph F. Ada and Felix P. Camacho's response opposing emergency motion for stay of order to hold runoff election

12/15/98 Filed order (Stephen S. TROTT and Barry G. SILVERMAN): Appellants' motion to stay the district court's 12/09/98 order is GRANTED. See Todman v. Boschulte, 694 F.2d 939, 940 (3d Cir. 1982). Appellants' motion to expedite the briefing schedule and hearing schedule is GRANTED.

1/11/99 Filed appellant Carl T.C. Gutierrez and appellant Madeleine Z. Bordallo's opening brief

2/5/99 Filed appellees Joseph F. Ada and Felix P. Camacho's brief

2/19/99 Filed Carl T.C. Gutierrez and Madeleine Z. Bordallo's reply brief

2/25/99 Filed appellants Carl T.C. Gutierrez and Madeleine Z. Bordallo's additional citations

3/8/99 ARGUED AND SUBMITTED to John T. NOONAN, A.W. TASHIMA, Jane A. Restani

4/19/99 FILED OPINION: AFFIRMED, REMANDED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published, John T. NOONAN; A.W. TASHIMA, author; Jane A. Restani.) FILED AND ENTERED JUDGMENT.

4/30/99 Filed appellant Carl T.C. Gutierrez and appellant Madeleine Z. Bordallo's petition for rehearing with suggestion for rehearing en banc

5/24/99 Filed appellant Carl T.C. Gutierrez and appellant Madeleine Z. Bordallo's motion to stay the mandate

5/25/99 Filed order (John T. NOONAN, A.W. TASHIMA); denying petition and the petition for en banc hearing

5/26/99 Filed appellee Joseph F. Ada's response opposing appellants' motion to stay the mandate

5/27/99 Filed order (A.W. TASHIMA): Appellants have made a conditional motion for stay of mandate to enable them to prepare and file a petition for a writ of certiorari with the U.S. Supreme Court. The motion was conditioned on the denial of appellants' then-pending petition for rehearing and rehearing en banc. That motion was received by the clerk on 5/24/99. On 5/25/99 the petition for rehearing and rehearing en banc was DENIED. Appellants' motion is GRANTED. Issuance of the mandate is stayed for a period of 35 days (the period requested by appellants), said 35-day period to commence on 6/1/99 and expire on 7/6/99.

6/1/99 Filed appellees' motion to modify stay of mandate issued 5/27/99

6/7/99 Filed appellants Carl T.C. Gutierrez and Madeleine Z. Bordallo's opposition and declaration in opposition to motion to modify stay of mandate

6/21/99 Filed order (John T. NOONAN, A.W. TASHIMA, Jane Restani): Plaintiffs'-appellees' motion to modify stay of mandate issued 5/27/99 is denied.

7/12/99 Received notice from Supreme Court: petition for certiorari filed

7/21/99 Filed order (A.W. TASHIMA): This court is informed that appellants have filed a timely petition for writ of certiorari with the U.S. Supreme Court. Accordingly, the stay of this court's mandate shall continue pending the Supreme Court's final disposition of the petition.

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UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

JOSEPH F. ADA and FELIX P. CAMACHO, Plaintiffs, vs. GOVERNMENT OF GUAM, GUAM ELECTION COMMISSION and its commissioners; JOSEPH F. MESA, JOSEPH T. DUENAS, FREDERICK J. HORECKY, DOUGLAS B. MOYLAN, ROSANNA D. SAN MIGUEL, LEONILA L.G. HERRERO, Defendants, and, CARL T.C. GUTIERREZ and MADELEINE Z. BORDALLO, Real Parties In Interest.	CIVIL CASE NO. CIV 98-00066 **COMPLAINT FOR DECLARATORY JUDGMENT AND REQUEST FOR ISSUANCE OF WRIT OF MANDAMUS** (Filed Dec. 1, 1998)

COME NOW Plaintiffs, Joseph F. Ada and Felix P. Camacho, and pray that: 1) this Court issue a Declaratory Judgment stating that a) Carl T.C. Gutierrez and Madeline Z. Bordallo were not elected by a majority of the votes cast by the people who were qualified to vote for the members of the Legislature of Guam, and b) pursuant to all requirements of 48 U.S.C. § 1422, a runoff election shall be held between the candidates for Governor and Lieutenant Governor, i.e., the Plaintiffs and defendants Carl T.C. Gutierrez and Madeline Z. Bordallo; and, 2) this Court issue a Writ of Mandamus: a) to review the Declaration of Election Results, adopted on November 16, 1998, by the Guam Election Commission, and the subsequent issuance of certificates of election, by the Guam Election Commission, and b) direct the Government of Guam, Guam Election Commission to hold a runoff election within 14 days of the issuance of a Declaratory Judgment. Further, Plaintiffs pray that this court: 1) order, and hold, evidentiary hearings for presentation of testimony, with respect to election irregularities, and 2) stay the fourteen day period for a runoff election between Plaintiffs and defendant's Carl T.C. Gutierrez and Madeline Z. Bordallo, the Real Parties in Interest.

JURISDICTION

1. The jurisdiction of this Court is invoked under the Constitution of the United States of America, Article III, § 2; 28 USC §§ 1331, 1361, 1651, 2201, and 2202; and 48 USC § 1422.

PARTIES

2. Plaintiffs, Joseph F. Ada and Felix P. Camacho, are each of them, over the age of majority, residents of Guam, and candidates for the offices of Governor and Lieutenant Governor, respectively, in the November 1998, elections.

3. Defendant Government of Guam, Guam Election Commission, is an agency of the government of Guam tasked with the responsibility to conduct fair and impartial democratic elections, in accordance with the laws of the United States and Guam, for the offices of Governor and Lieutenant Governor, as well as the members of the Legislature, and Congressional representative, in the November 1998, elections.

4. Defendants Carl T.C. Gutierrez and Madeline Z. Bordallo are residents of Guam, over the age of majority, and candidates for the offices of Governor and Lieutenant Governor, respectively, in the November 1998, elections.

FACTS

5. On November 3, 1998, a General Election for the candidacies of Governor and Lieutenant Governor of Guam took place on the Island of Guam. Initial results of the General Election revealed that: 1) a total number of 48,666 votes were cast for the candidacies of Governor and Lieutenant Governor; 2) Carl T.C. Gutierrez and Madeline Z. Bordallo (hereinafter "Gutierrez") garnered a total number of 24,250 votes cast; 3) Joseph F. Ada and Felix P. Camacho (hereinafter "Ada") garnered a total

number of 21,200 votes cast; 4) write-in candidates garnered a total number of 1,294 votes cast; 5) a total number of 1,313 votes were cast which did not go to Gutierrez, Ada or a write-in candidate; and, 6) a total number of 609 votes were cast for both Ada and Gutierrez (hereinafter the "Initial Results"). See, Exhibit 1.[1]

6. Following the General Election, various claims of election irregularities, including ballot count discrepancies[2] and non-U.S. citizen voters, were revealed to the Guam Election Commission (hereinafter the "GEC"). See, Exhibit 2, and Affidavit of Douglas B. Moylan. Furthermore, the GEC was confronted with a question as to the exact interpretation of the phrase "a majority of the votes cast", as that phrase is set out in the Organic Act of Guam. 48 U.S.C. § 1422.

7. From November 3, 1998 to November 11, 1998, the GEC, comprised of five on-island members[3], three members who were representatives of the Democrat

---

[1] These figures for votes cast (and Exhibit 1) were attached to, and made a part of, the Declaration of Election Results made by the Guam Election Commission at its November 16, 1998 meeting.

[2] 68% of the Precincts evidenced ballot count discrepancies.

[3] Under 3 GCA § 2101, the Guam Election Commission must consist of seven members, three members (appointed by the Governor) from each of Guam's two political parties, and one member selected and appointed by the six members appointed by the Governor (the "independent member"). During the period in question, however, the independent member had not been appointed. Furthermore, Leonila L.G. Herrero, a Republican Party of Guam representative on the Guam Election Commission, was off-island.

Party of Guam (and therefore also tied to Gutierrez) and two members who were representatives of the Republican Party of Guam (and therefore also tied to Ada), were at a deadlock with respect to the claims of election irregularities and the proper definition of "a majority of the votes cast. . . ."[4]

8. On or about November 11, 1998, Leonila L.G. Herrero, a Republican Party of Guam representative on the GEC, who had been off-island for some time, and therefore had not recently participated in any GEC meetings, arrived on Guam. On November 12, 1998, Ms. Herrero appeared at a televised GEC meeting, which meeting was hastily called, with unresolved questions regarding proper notice to GEC members, by certain members tied to Gutierrez. At the November 12, 1998 meeting, a GEC member tied to Gutierrez moved along with other GEC members who were present at the meeting, to declare Gutierrez as having the number of votes for the office of Governor and Lieutenant Governor. The televised November 12, 1998 meeting showed that Ms. Herrero possessed no clear grasp, or perhaps absolutely no grasp, of the issues surrounding the claims of election irregularities. Furthermore, it appeared that GEC members of the Gutierrez camp intended to "railroad" their motion through the meeting. Nevertheless, although under obvious pressure to vote in favor of the Gutierrez camp motion, Ms. Herrero refused to give the Gutierrez camp her vote.

---

[4] Under 3 GCA § 2101, the vote of a majority of the Guam Election Commission is required to make any action of the Guam Election Commission effective.

9. On November 13, 1998, the GEC held a meeting at which certain members discussed, but did not resolve, problems in connection with ballot count discrepancies, missing absentee ballots, and non-U.S. citizen voters.[5] (Other problems in connection with the 1998 General Election, which problems the GEC has not clearly resolved, include: 1) the question of whether either blank or spoiled ballots should be counted as "votes cast" in the General Election; 2) votes cast by under-age voters; 3) votes cast by voters with one, identical social security number[6]; 4) ballots being offered, on November 3, 1998, not at the polls, but at Guam Memorial Hospital, in violation of the Guam elections Law.[7])

10. Once again, on November 13, 1998, although under pressure to vote in favor of a Gutierrez camp motion similar to the November 12, 1998 motion, Ms. Herrero refused to give the Gutierrez camp her vote. Surprisingly however, at a GEC meeting on November 16, 1998[8], the GEC having not yet properly resolved any of

---

[5] According to a report by the Superior Court of Guam, made to the Guam Election Commission, with names drawn from a sample of only 9,000 registrants at the Department of Motor Vehicles, Government of Guam, it appears that at least 482 non-U.S. citizens voted in the 1998 General Election.

[6] 151 voters were reported to have one, identical social security number.

[7] 3 GCA § 1101 et. seq.

[8] Under 5 GCA § 8103, the Guam Election Commission meetings must be open and public, unless the Commission determines to exclude members of the public for the orderly conduct of its business. At the November 16, 1998 Guam Election Commission meeting, however, members of the Guam Police Department, with no authority from the Election

the above-noted problems, Ms. Herrero voted for a Gutierrez camp sponsored motion to: 1) declare Gutierrez as having the largest number of votes for the office of Governor and Lieutenant Governor, and 2) certify Gutierrez as the winner of the election.[9]

QUESTIONS PRESENTED

11. The Organic Act of Guam states, in part, as follows:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidate receives a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. 48 U.S.C.A. § 1422 (West 1996) (emphasis added).

Commission, determined to keep certain members of the public, including one senatorial write-in candidate, from attending the meeting. As a result, pursuant to 5 GCA § 8114, the possibility exists that actions of the Guam Election Commission at the November 16, 1998 meeting are void and of no effect.

[9] It is Plaintiffs' belief that soon after the November 16, 1998 meeting, Ms. Herrero departed from Guam.

12. Black's Law Dictionary defines the phrase "majority vote" as follows:

> Majority vote. Vote by more than half of voters for candidate or other matter on ballot. BLACK'S LAW DICTIONARY 955 (6th ed. 1990).

13. Nowhere in Guam statutes, or the Organic Act, however, is the phrase "a majority of the votes cast" defined. The facts indicate that the GEC did not count either blank or spoiled ballots in calculating the total number of votes cast in the 1998 General Election. Therefore, the first question presented to this Court is: As blank and spoiled ballots were not counted in connection with GEC's November 16, 1998 Declaration of Election Results, should not the GEC declare that Gutierrez did not receive the majority of votes cast in the 1998 General Election?

14. Assuming that a total number of 50,588 votes were cast for the candidacies of Governor and Lieutenant Governor in the 1998 General Election, under the definition set out in Black's Law Dictionary, a majority vote is half of the 50,588 votes cast. Half of 50,588 votes, equals 25,294 votes (50,588 x 50% = 25,294). However, Gutierrez garnered only 24,250 votes. Ada garnered 21,200 votes. The second question thus presented is: As neither Gutierrez, nor Ada, received a majority of the votes cast in the 1998 General Election, should not the GEC, pursuant to the Organic Act of Guam, require a runoff election between Gutierrez and Ada?

15. A third question is presented in connection with the numerous election irregularities overlooked by the GEC. Specifically, the third question is: Should not the

GEC resolve the questions surrounding: ballot count discrepancies; missing absentee ballots; illegal and non-citizen voters; votes by voters with one, identical social security number, and voting on November 3, 1998, at the Guam Memorial Hospital, in order to determine whether Gutierrez or Ada received a majority of the votes cast in the 1998 General Election?

WHEREFORE, Plaintiffs pray that this Court:

1. Issue a Declaratory Judgment stating that Carl T.C. Gutierrez and Madeline Z. Bordallo were not elected by a majority of the votes cast by the people who were qualified to vote for the members of the Legislature of Guam;

2. Issue a Declaratory Judgment and Writ of Mandamus requiring that a runoff election shall be held between the candidates for Governor and Lieutenant Governor, i.e., the Plaintiffs and Carl T.C. Gutierrez and Madeline Z. Bordallo;

3. Issue Writ of Mandamus to review the Declaration of Election Results, adopted on November 16, 1998, by the Guam Election Commission;

4. Issue a Writ of Mandamus to review the issuance of certificates of election, by the Guam Election Commission;

5. Order, and hold, evidenciary hearings for presentation of testimony, with respect to election irregularities;

6. Stay fourteen day period for a runoff election between Plaintiffs and Carl T.C. Gutierrez and Madeline Z. Bordallo, the Real Parties in Interest; and,

7. Grant Plaintiffs their court costs and reasonable attorney's fees and such other and further relief or recovery to which they may be entitled.

Dated this 1st day of December 1998.

THE VANDEVELD LAW OFFICES, P.C.

/s/ Curtis C. Van de veld
CURTIS C. VAN DE VELD
Attorney for Plaintiffs

VERIFICATION

I, JOSEPH F. ADA, the undersigned, being first duly sworn, depose and say:

That I am a party to the above-entitled action and that I have read the foregoing complaint and to the best of my knowledge and belief, the matters therein stated are true and correct, except as to those matters alleged upon information and belief, as to those matters I believe them to be true.

Dated: 12/1/98

/s/ Joseph F. Ada
JOSEPH F. ADA

SUBSCRIBED AND SWORN to before me, a Notary Public in and for Guam this 1st day of December 1998, by JOSEPH F. ADA.

Victoria S. Quichocho
[Notary Seal]

VERIFICATION

I, FELIX P. CAMACHO, the undersigned, being first duly sworn, depose and say:

That I am a party to the above-entitled action and that I have read the foregoing complaint and to the best of my knowledge and belief, the matters therein stated are true and correct, except as to those matters alleged upon information and belief, as to those matters I believe them to be true.

Dated: 12/1/98

/s/ Felix P. Camacho
FELIX P. CAMACHO

SUBSCRIBED AND SWORN to before me, a Notary Public in and for Guam this 1st day of December 1998, by FELIX P. CAMACHO.

Victoria S. Quichocho
[Notary Seal]

EXHIBIT 1

GUAM

GENERAL ELECTION NOVEMBER 3, 1998

	Total Number Voting		48515			
	Precincts Reporting	72 of	72	100.00%	48,666	
GOVERNOR/LIEUTENANT GOVERNOR						
***	GUTIERREZ/BORDALLO –D		24159	49.79%	24,250	49.82%
	ADA/CAMACHO –R		21147	43.58%	21,200	43.56%
	_____		1291	2.66%	1,294	2.65%
	Total Votes Cast		48515		48,666	
	Number Under Votes		1312	2.70%	1,313	2.69%
	Number Over Votes		606	1.24%	609	1.25%
LEGISLATURE (Elect 15)						
***	AGUON, FRANK BLAS JR. –D		27666	3.80%	27,752	3.81%
***	CALVO, EDDIE BAZA –R		27117	3.72%	27,187	3.73%
***	SANCHEZ, SIMON A. II –R		23889	3.28%	23,939	3.28%
***	MOYLAN, KALEO –R		23666	3.25%	23,721	3.25%
***	PANGELINAN, BEN C. –D		23241	3.19%	23,316	3.20%
***	UNPINGCO, ANTONIO REYES –R		22873	3.11%	22,729	3.12%
***	FORBES, MARK –R		22574	3.10%	22,629	3.10%
***	KASPERBAUER, DR. LARRY F. –R		22380	3.07%	22,425	3.08%
***	LAMORENA, ALBERTO A. –R		22131	3.04%	22,181	3.04%
***	LEON GUERRERO, CARLOTTA A. –R		22011	3.02%	22,056	3.03%
***	CAMACHO, MARCEL G. –R		21548	2.96%	21,596	2.96%
***	BROWN, JOANNE M. SALAS –R		20603	2.83%	20,655	2.83%
***	SALAS, DR. JOHN CAMACHO –R		19874	2.73%	19,924	2.73%
***	BLAZ, ANTHONY CRISOSTOMO –R		19036	2.61%	19,084	2.62%
***	BERMUDES, EULOGIO –D		18929	2.60%	19,002	2.61%

FLORES, WILLIAM B.S.M. –D	18622	2.55%	18,696	2.56%
CHARFAUROS, MARK CAMPOS –D	18578	2.55%	18,633	2.56%
CAMACHO, FRANCISCO PAULINO –D	18560	2.55%	18,640	2.56%
BLAS, JR., FRANK FLORES –R	18325	2.51%	18,372	2.52%
NELSON, TED SGAMBELLURI –D	17633	2.42%	17,697	2.43%
ESPALDON, JAMES V. – R	17628	2.42%	17,655	2.42%
CRUZ, EDWARDO J., M.D. –R	16809	2.30%	16,842	2.31%
NELSON, JAMES E., III –D	16756	2.30%	16,824	2.31%
LUJAN, GALEN J. –D	14368	1.97%	14,428	1.98%
BITANGA, EDUARDO C. –D	12180	1.67%	12,232	1.68%
PEREZ, NORBERT MUNOZ JR. –D	10177	1.39%	10,219	1.40%
CHARGUALAF, DOT –D	8327	1.14%	8,362	1.14%
CUNDIFF, BILL BABAUTO –D	8084	1.11%	8,127	1.11%
TORRES, TRINI TAITINGFONG –D	7861	1.08%	7,901	1.08%
PLEADWELL, JEFF –D	7439	1.02%	7,475	1.02%
DUENAS, LUIS PAULINO –D	6828	.93%	6,868	.94%
	24447	3.35%	24,506	3.36%
Total Votes Cast	727725		727,725	
Number Under Votes	130521	17.93%	130,523	17.93%
Number Over Votes	17250	2.37%	17,257	2.37%

HOUSE OF REPRESENTATIVES					
***	UNDERWOOD, ROBERT A. –D	34070	70.22%	34,179	70.23%
	CRUZ, MANUEL G. –R	10735	22.12%	10,763	22.11%
		1107	2.28%	1,111	2.28%
	Total Votes Cast	[Illegible]		[Illegible]	
	Number Under Votes	[Illegible]	4.62%	2,253	4.62%
	Number Over Votes	359	.73%	360	.73%
HAYA DISTRICT BOARDS OF EDUCATION (Elect 6)					
***	BARCINAS, TOMAS SAN NICHOLAS	6638	8.71%	6,685	8.78%
***	PEREZ, VICENTE PANGELINAN	4875	6.40%	4,910	6.45%
***	LIZAMA, KELLY A.	4718	6.80%	4,749	6.2%
***	PANGELINAN, ZITA D.	4703	6.18%	4,734	6.22%
***	SANTOS, ROKE BORJA	4468	5.87%	4,498	5.91%
***	SABLAN, ALEJO CONCEPCION	4406	5.79%	4,446	5.84%
	SANTOS, FRED C.	4052	5.32%	4,092	5.37%
	MCMANUS, STEVEN CASTRO	3347	4.39%	3,374	4.43%
	MEAD, BARRY L.	2875	3.77%	2,894	3.80%
	HERLIHY, HORACE F.	2704	3.55%	2,727	3.50%
	BIMA, WESLEY T.	1953	2.56%	1,960	2.30%
	ALIG, FRANKLIN J.	1718	2.25%	1,729	2.20%
	_____	168	.22%	170	.20%
	Total Votes Cast	76092		76,092	
	Number Under Votes	29149	38.30%	29,169	38.3%
	Number Over Votes	324	.42%	324	.42%

KATTAN DISTRICT BOARDS OF EDUCATION
(Elect 6)

***	PALOMO, ROSA SALAS	7112	8.19%
***	ADA, PETER ALECXIS DIAZ	6976	8.03%
***	SANTOS, GEORGE AGUON	5011	5.77%
***	TOVES, FRANCIS PATRICK	4953	5.71%
***	CRUZ, FRANKLIN SABLAN	4789	5.51%
***	QUINTANILLA, JEANNETTE M.N.	3895	4.48%
	ARTERO, JESUS M.	3576	4.12%
	TAIMANRO, MONICA GUERRERO	3434	3.95%
	CRUZ, MICHAEL A.	3297	3.79%
	CEPEDA, ROMAN G.	3089	3.55%
	BURCH, JOHN T.	2680	3.08%
	DE ORO, ARTHUR A.	2584	2.94%
	AYUYU, RONALD A.	1709	1.96%
	SHRINGI, BOBBY A.	1675	1.92%
	_____	212	.24%
	Total Votes Cast	86796	
	Number Under Votes	31366	38.13%
	Number Over Votes	462	.53%

LAGU DISTRICT BOARDS OF EDUCATION
(Elect 6)

***	ARTERO, EDDIE CALVO	7719	8.83%	7,731	8.84%
***	HERNANDEZ, ROMEO MENO	6063	8.93%	6,069	6.94%
***	GUERRERO, SOLEDAD ROBERTO	5807	6.64%	5,814	6.65%
***	TAITANO, FRANCIS J.	5355	6.12%	5,361	6.13%
***	OPENA, LILLIAN S.N.	5341	6.11%	5,347	6.11%
***	ARMSTRONG, JOHN	5212	5.96%	5,221	5.97%
	_____	392	.44%	393	.44%
	Total Votes Cast	87384		87,384	
	Number Under Votes	51435	58.86%	51,439	58.86%
	Number Over Votes	60	. 6%	60	.06%

LUCHAN DISTRICT BOARDS OF EDUCATION
(Elect 6)

***	LUJAN, JESSE	3587	8.78%	3,595	8.80%
***	NELSON, PETER R.	2564	6.28%	2,577	6.31%
***	HOLLOWAY, CALVIN	2295	5.62%	2,303	5.64%
***	SANTOS, DANNY A.	2214	5.42%	2,222	5.44%
***	SLATER, ROGER	1912	4.68%	1,916	4.69%
	_____	596	1.46%	597	1.46%
	Total Votes Cast	40818		40,818	
	Number Under Votes	27650	67.73%	27,665	67.77%
	Number Over Votes	0	. 0%	0	. 0%
	TOTAL BALLOTS CAST	48515		48,666	
	TOTAL TYPE 1 BALLOTS	48515			

DECLARATION OF ELECTION RESULTS PURSUANT TO 3 GCA §11132

WE, the undersigned members of the Guam Election Commission, hereby DECLARE, pursuant to 3 GCA §11132, that the following persons have been elected to office in the General Election conducted on November 3, 1998, such persons having the largest number of votes for that office:

1. FOR GOVERNOR AND LIEUTENANT GOVERNOR:

   CARL T.C. GUTIERREZ FOR GOVERNOR
   MADELEINE Z. BORDALLO FOR LIEUTENANT GOVERNOR

2. FOR DELEGATE TO THE UNITED STATES HOUSE OF REPRESENTATIVES:

   ROBERT A. UNDERWOOD

3. FOR THE GUAM LEGISLATURE:

   (1) FRANK BLAS AGUON, JR.
   (2) EDDIE BAZA CALVO
   (3) SIMON A. SANCHEZ, II
   (4) KALEO MOYLAN
   (5) BEN C. PANGELINAN
   (6) ANTONIO REYES UNPINGCO
   (7) MARK FORBES
   (8) DR. LARRY F. KASPERBAUER
   (9) ALBERTO A. LAMORENA, V.
   (10) CARLOTTA A. LEON GUERRERO

(11) MARCEL G. CAMACHO

(12) JOANNE M. SALAS BROWN

(13) DR. JOHN CAMACHO SALAS

(14) ANTHONY CRISOSTOMO BLAZ

(15) EULOGIO C. BERMUDES

4. The foregoing persons have been elected to the aforementioned offices. The Guam Election Commission shall forthwith make and issue "certificates of election" for each person elected to office pursuant to 3 GCA §11133.

DULY AND REGULARLY ADOPTED ON THE 16th DAY OF NOVEMBER, 1998.

JOSEPH F. MESA, *Chairman*	**JOSEPH T. DUENAS,** *Vice Chairman*
FREDERICK J. HORECKY, *Member*	**DOUGLAS B. MOYLAN,** *Member*
ROSSANA D. SAN MIGUEL, *Member*	**LEONILA L.G. HERRERO,** *Member*

[LOGO] GUAM ELECTION COMMISSION [LOGO]
Kumision Ileksion Guahan
P.O. Box 8G – Hagatna, Guam 96932
Tel: (671) 477-9791/3 * Fax: (671) 477-1895

November 12, 1998

MEMORANDUM

TO: Board of Directors

FROM: Executive Director

SUBJECT: **Audit Report of Ballot Count Discrepancies**

As directed by the Board at the reconvened Special meeting of November 6, 1998, attached is the audit report of the ballot count discrepancies showing in forty-nine precincts. Staff members conducted the audit with the presence of representatives of both political parties.

In summary, and excluding the three (3) precincts in which ballots were not cast, the common discrepancy found was machine count problems showing undercount and overcount and Precinct Officials miscounting signatures on the Voter Signature Roster. Others were misprecincts (precincts mixed in with another precinct) where some registered in its respective precinct, and some not.

Given this audit report, I will await Board's further direction. I will be available if you should have any questions.

/s/ Henry A. Torres
HENRY A. TORRES

Attachment

AUDIT REPORT OF BALLOT COUNT DISCREPANCIES

PRECINCTS	REMARKS/FINDINGS
P-1	35 Absentee ballots were recorded on Voter Signature Roster, but not cast. [35]
P-4A	1) Precinct Officials miscounted the Voter Signature Roster by 1. 2) Machine undercount = 1.
P-5	One marked ballot was found in ballot box. Could not determine whether it was a cast ballot or spoiled ballot (envelope containing spoiled ballots were not defaced). Machine undercount = 1.
P-5A	Contained mis-precinct (49 ballots belonging to Umatac P-6). Machine overcount = 4.
P-6	Contained mis-precinct (1 ballot belonging to Talofofo P-9A). Machine overcount = 1. [100]
P-8	1) 100 cast ballots were placed in an envelope marked USED BALLOTS and taped together with UNUSED BALLOT ENVELOPES containing the unused ballots. 2) Precinct Officials miscounted the Voter Signature Roster.
P-9	1) Precinct Officials miscounted the Voter Signature Roster. 2) Machine overcount = 1.

P-9A	One ballot found with P-6 ballots was not recorded.
P-11A	Precinct Officials counted the rejected absentee ballots on the Voter Signature Roster = 4.
P-11B	Precinct Officials counted a double signature.
P-12B	Contained mis-precinct (one ballot belonging to P-12). Machine undercount = 2.
P-13	Contained mis-precinct (one ballot belonging to MTM P-14A).
P-17A	Contained one ballot more than the number of Voters who voted.
P-17G	1) Precinct Officials inventory of Unused Ballots was off by 23. [23] 2) Precinct Officials misounted [sic] the Voter Signature Roster by 2. 3) Machine undercount = 1. [174 +8 182] [168 16]
P-18D	1) Contained one mis-precinct (which did not register at its respective precinct) 2) A voter casted both his spoiled and good ballot in ballot box. 3) Machine overcount = 2.

P-18G	1) 16 Absentee ballots were recorded on Voter Signature Roster, but not cast. [16]
	2) 76 ballots were found with P-18H.
	3) Machine undercount = 1.
P-18H	1) Contained mis-precinct (76 ballots which registered in its respective precinct).
	2) Machine undercount = 2.
P-19	1) Contained mis-precinct (3 ballots belonging to P-19A which did not register in its respective precinct).
	2) Machine overcount = 1.
P-19C	1) 8 signatures were not counted in the Voter Signature Roster.
	[- 8]
	2) Machine undercount = 1.

P-2A	P-14	Precinct Officials miscounted the Voter Signature Roster.
P-4	P-15	
P-4B	P-18K	
P-13B		
P-4C	P-16B	Machine count problems (overcount & undercount)
P-5B	P-16C	
P-7	P-17	
P-7A	P-17C	
P-8B	P-17F	

P-10B	P-18C
P-12	P-18I
P-13A	P-18J
P-14A	P-18L
P-15C	P-19B
P-16A	P-19D
	P-19E

EXHIBIT 2

DISTRICT COURT OF GUAM
HAGATNA, GUAM

JOSEPH F. ADA and FELIX P. CAMACHO, Plaintiffs, vs. GOVERNMENT OF GUAM, GUAM ELECTION COMMISSION, and ITS COMMISSIONERS; JOSEPH F. MESA JOSEPH T. DUENAS, FREDERICK J. HORECKY, DOUGLAS B. MOYLAN, ROSANNA D. SAN MIGUEL, LEONILA L.G. HERRERO, Defendants. *And,* CARL T.C. GUTTERREZ and MADELEINE Z. BORDALLO, Real Parties In Interest.	)	Civil Case No. ___ **AFFIDAVIT OF DOUGLAS B. MOYLAN**

DOUGLAS B. MOYLAN, being first duly sworn, deposes and says:

1. I make this Affidavit on personal knowledge, having personal knowledge of all the facts herein stated.

2. I am competent to testify to the matters stated herein and would so testify in any trial or hearing concerning this matter.

3. I am a Guam Election Commission ("GEC" *or* "Commission") member and have been a member since May 9, 1996, and was recently re-appointed and sworn-in on May 14, 1998. My term expires on May 20, 2000.

4. On Tuesday, November 3, 1998 I was present at the Election Central at the University of Guam Computer Center since about 8:00 p.m. November 3, 1998 was the General Election.

5. I was present at the convening of the GEC meeting at approximately 9:10 p.m. on November 3, 1998. Present at the meeting were the Chairman, Mr. Joseph Mesa; the Vice-Chairman, Mr. Joseph Duenas; Member Attorney Frederick Horecky; Member Mayor Rosanne San Miguel; and myself. The meeting was convened and shortly thereafter recessed for purposes of beginning tabulating the election results.

6. A technical representative from Election Systems and Software, formerly American Information Systems, was on Island for purposes of assisting in the operation of the tabulation machines that evening. His name was Mr. Dan Stussey.

7. Sometime shortly after the *first* tabulation report had been printed on the evening of November 3, 1998, showing a difference of approximately one hundred (100) votes between the Gubernatorial candidates, the electrical power at the Election Central browned and then shut off for approximately 3-5 seconds. The lights on the tabulation machines browned then shut off, as well as all other lights in the room. It was uncertain to me whether the power fluctuation and temporary outage effected [sic] the tabulation machines.

8. Shortly after the *second* tabulation results summary, after fifty-one (51) of the seventy-two (72) precincts were tabulated, the Chairman of the GEC brought to Mr. Stussey's attention that the summary results did *not* appear consistent with a precinct report that had also been generated. Mr. Stussey then re-ran the magnetic storage tapes into a machine he called an "accumulator," and the tabulation results changed.

9. The GEC then publicly acknowledged to the media that a technical error occurred and amended the *second* summary tabulation report (*uncertified*) of fifty-one (51) of the seventy-two (72) precincts. That evening a total of four summary reports were disseminated to the media, one (1) of which, described herein, was deemed in error.

10. During the evening of November 3, 1998, GEC staff commented that certain precinct officials had brought in their ballots in their personal vehicles. They were also unescorted by Guam Police Department officers, which I understood was contrary to GEC standard operating procedures. I was unsure whether all precinct officials traveled together from that particular precinct(s) with the ballot box.

11. On November 3, 1998 I noticed during a cursory review of the ballots that several ballots for the Gubernatorial race did *not* have marked either Gubernatorial candidate, but actually blackened the oval and wrote in a particular Gubernatorial team (i.e. Gutierrez/Bordallo or Ada/Camacho) on the line provided for write-ins.

12. In the early morning hours of November 4, 1998, during the tabulation, I asked the GEC legal counsel what

was the standard that the GEC had to apply under the 1950 Organic Act of Guam for a Gubernatorial race due to the close contest. Counsel advised me and Member Horecky that the winner would require a majority of the votes cast, *however,* that there was a question as to whether to count the undercount ballots as part of the total votes cast. Undercount ballots are ballots which mark neither candidate and do not identify any write-in candidate.

13. The GEC decided in an earlier meeting to place all offices on a single ballot.

14. I left the Election Central at approximately 2:30 a.m. on Wednesday, November 4, 1998, shortly after the fourth and final machine counted summary tabulation results were completed. I did *not* stay at Election Central to await the hand count of ballots rejected by the balloting machines, referred to as the "reconciliation process." I understand that this reconciliation actually took until 7 a.m. on Wednesday, November 4, 1998.

15. The write-in ballots had to be manually, hand tabulated and were estimated by the GEC Executive Director to take literally days to do so. The write-in ballots were *not* tabulated by November 4, 1998, but were only completed on Thursday evening, November 12, 1998. I understand that the balloting machines only show on their report whether a ballot contained a write-in for a particular office, but that who that write-in was had to be manually, hand identified and counted, which would be a time consuming process.

16. Subsequent to the convening and recess of the GEC meeting on Tuesday, November 3, 1998, the GEC convened during the following times:

November 3, 1998	Convening of GEC Mtg. & Recess
November 6, 1998	Meeting Called to Order & Recessed
November 9, 1998	Meeting Called to Order & Recessed
November 12, 1998	(*Meeting in Controversy*)
November 13, 1998	Meeting Called to Order & Recessed
November 16, 1998	Meeting Adjourned

17. At the meeting on November 6, 1998 I asked whether the write-in ballots had been tabulated, I was advised that the write-in tabulation had commenced on Thursday, November 5, 1998, but was ongoing. I asked whether there were any police officers continuing to secure the ballots at the Election Center. I was informed that the ballots were now at the GEC Hagatna Office and that no police officers were guarding the still uncounted ballots. I was concerned about the requirement of 3 GCA § 11128, *Election Center Open Until Tabulation Complete.* During the meeting the GEC Executive Director advised the Commission that his preliminary findings showed that Hagatna, Inarajan and Dededo, as well as forty-six (46) other precincts, of seventy-two (72) precincts had discrepancies. I understood that this was the first time in the GEC's history of the problems of this scope. The Commission then asked the GEC Executive Director to perform an audit, and to *temporarily* stop the write-in

ballot tabulation. A one (1) page summary of precinct official counts v. machine counts was presented to the Commission by the GEC Executive Director.

18. At the meeting on November 9, 1998 the GEC Executive Director orally gave the Commission his findings, which could *not* explain how or why ballots had been inaccurately counted by either the precinct officials or the tabulation machines. I motioned that due to the balloting discrepancies of approximately forty-nine (49) of the seventy-two (72) precincts that the GEC issue subpoenas upon the precinct officials pursuant to Title 3 Guam Code Annotated § 11130, *Incomplete or Ambiguous Precinct Forms,* in order to perform an adequate investigation. I believed that the Commission needed to obtain a factual basis for the discrepancies, before applying the legal standard. The motion failed to receive a vote to second the motion. I was subsequently informed by the GEC Executive Director that even the balloting machines did *not* appear to be counting the ballots accurately.

19. At the November 9, 1998 meeting the GEC Executive Director showed the Commission documents indicating that a "Linda Naputi" had affixed her signature to two (2) other persons in Inarajan which seemed to indicate that she voted for those persons. No investigation could be authorized due to the lack of four (4) votes.

20. At the November 9, 1998 meeting it was also brought to the GEC's attention by the Administrative Director of the Superior Court of Guam, via a November 9, 1998 letter to the GEC Executive Director, that according to their juror list that approximately five hundred seventy-one (571) persons were on the GEC voter listing,

however, that they showed up in government records as non-U.S. citizens. Further, that there were one hundred fifty-one (151) names on the GEC voter listing who had identical social security numbers. The sampling taken was from 9,674 DMV names. The GEC voter listing contained in excess of 57,000 names for the General Election. Upon motion to investigation [sic] this matter, the GEC failed to obtain the four (4) votes needed to initiate any investigation, nor have the list transmitted to the U.S. Immigration and Naturalization Service for identification. According to the GEC Executive Director, approximately four hundred eighty-two (482) of those persons who were identified as non-U.S. citizens *actually* voted.

21. Previously, on or about June 25, 1997 Judge John S. Unpingco transmitted a letter to the GEC informing it of names on the GEC voter listing who were *not* U.S. citizens. On November 11, 1998 I visited the GEC office and requested the GEC Executive Director pull all the GEC minutes and the audio tapes where this issue was discussed. The following dates for the pertinent GEC minutes and audio tapes were as follows:

August 14, 1997

September 15, 1997

October 9, 1997

22. Upon review of the GEC minutes and the audio tapes of the meetings I noticed that although GEC action was taken on certain specific names identified as non-U.S. citizens, as well against the voter registrars who signed them into the GEC voter list, the GEC did *not* further investigate the matter nor change its registration process

to avoid future errors. Judge Unpingco and the courtroom clerk identified that there were also other names on the GEC voter list that were brought to the court's attention who were *not* U.S. citizens. At the September 15, 1997 GEC meeting I asked whether the Commission could correct the process for identifying U.S. citizens by sending names provided for the GEC voter listing to the U.S. Immigration and Naturalization Service. Vice-Chairman Perez did *not* believe that they could identify non-naturalized U.S. citizens.

23. At the October 9, 1997 GEC meeting the Commission voted to send the names of two (2) voter registrars who signed up non-U.S. citizens into the GEC voter listing to the Office of the Attorney General, after review of the letter by Member Horecky. I was not sure if the letter was ever transmitted.

24. At the November 9, 1998 meeting the GEC passed a motion to *restart* counting the write-in ballots from the place left off since temporarily halting counting due to the precinct audit. The GEC agreed to meet once the write-in ballots were tabulated, which the GEC Executive Director estimated by noon on Thursday, November 12, 1998. I also amended a motion made by Member Horecky that the approximately ninety-nine (99) ballots found in an envelope from an Inarajan precinct be tabulated and that the approximately thirty (30) absentee ballots found from a Hagatna precinct also be tabulated, *however,* that the results *not* be included with the other tabulated results yet. The Chairman raised a legal question as to whether they could now be counted as part of the results due to the legal requirement under the Election Code that the precinct officials deposit the absentee

ballots into the ballot box. I was *not* satisfied as to the origin nor chain of custody of these newly found ballots and pressed for an investigation.

25. Notwithstanding the motion, which passed on November 9, 1998, to restart tabulation of the write-in votes from where the GEC last left off, I was informed by the GEC Executive Director that Member Duenas informed him after the meeting to perform the counting of the write-in ballots from the beginning. The recounting of the write-in ballots from the beginning would delay the write-in completion time to Friday, November 13, 1998. I was unaware of this change of the motion regarding counting of write-in votes, nor did I consent to the change.

26. On November 10, 1998 I requested via letter that the GEC Executive Director prepare subpoenas for the precinct officials where discrepancies were discovered under my authority as a Member of the GEC for questioning to commence at noon on November 12, 1998.

27. I was verbally advised on November 11, 1998 by the GEC Executive Director that the GEC did *not* have funding to issue the subpoenas nor pay the process servers. I therefore asked that the precinct officials be contacted and asked to appear for the Hagatna, Inarajan and Dededo precincts for noon on November 12, 1998. I subsequently prepared a list of questions for the precinct officials and coordinated with legal counsel to be present at the questioning.

28. I understood after speaking with a GEC staffer on the evening of November 11, 1998 that the meeting for November 12, 1998 was cancelled and rescheduled due to

the non-completion of the tabulation write-in results, and that notices were sent to the media for dissemination to the public. The meeting was rescheduled to November 13, 1998 at noon.

29. I understood after speaking with the GEC Executive Director on November 12, 1998 that Members Duenas, Horecky and San Miguel visited the GEC Executive Director with Attorney Carbullido towards the early evening or early afternoon of November 11, 1998, demanding that the meeting scheduled for November 12, 1998 be conducted. I understand that a letter was subsequently transmitted to him, and I received a copy.

30. On November 12, 1998 at about noon, I appeared to begin the questioning of the precinct officials. While at the meeting the Vice-Chairperson, Member Horecky and Member San Miguel appeared and began having set up a table to commence their meeting. I advised the Vice-Chairperson before the meeting that I objected to being at this meeting as tabulation was *not* completed. We were all seated at the table at about 12:00 p.m. I then asked why we weren't going to begin, and the Vice-Chairman stated that we should wait for the Chairperson as he would wait for us.

31. At approximately 12:20 p.m. previously absent member Leonila L.G. Herrero, who had been off-Island for several months, appeared. I was unaware she returned on Island. The Vice-Chairman then immediately began the meeting. I placed on the record that I was present under protest. Member Horecky then brought up the issue of declaring the meeting an emergency. I asked

what was the emergency and was informed that the people of Guam want resolution of this matter. I objected to the motion for an emergency declaration. Notwithstanding the objection the other four (4) members passed the emergency certification, several copies which had already been prepared in writing. I signed the copies "objected to."

32. At the November 12, 1998 meeting I asked whether the four (4) other members present had met alone *before* the meeting in violation of the Open Government Law, Title 5 Guam Code Annotated.

33. At the November 12, 1998 meeting Member Horecky then produced a document labeled as "Exhibit A" showing the tabulation results he prepared for the Gubernatorial and the Congressional offices with the write-ins *not* shown. I objected to the proceeding as being premature due to the lack of completion of the write-in tabulation results. I stated that because of the ambiguity in the 1950 Organic Act of Guam that it was unclear whether undercount ballots should be counted and that if they were that the Gutierrez/Bordallo team did *not* achieve 50% + 1 (majority) of the votes required, *however*, that if the tabulation of the write-in votes were completed that they may achieve the 50% + 1 under both analyses. I also read for the GEC's attention the second sentence of 3 GCA § 11115, *Write-In Votes.*

34. At the November 12, 1998 meeting I further objected to the *ex parte* contact of the Vice-Chairman having unilaterally changed the motion passed by the GEC on November 9, 1998 to begin counting the write-ins from where the GEC last left off. Had the motion been

complied with the tabulation would have been completed by then. Tabulation of the write-in votes actually completed on the evening of November 12, 1998.

35. At the final meeting on Monday, November 16, 1998 I objected to Member Horecky's motion to certify the offices, except the School Board, as being in violation of the Roberts Rules of Order, as the motion was previously raised at the GEC meeting held on Friday, November 13, 1998 and failed. GEC Counsel concurred with the application of the Roberts Rules of Order and my interpretation. Counsel stated that only a Member who voted against the motion previously made could make it at a subsequent time. I further objected to the motion as having no tabulation numbers to support it. Member Horecky then amended his motion to include the third column of the GEC issued tabulation results. I again reincorporated my objection under the Roberts Rules of Order on making an already failed motion, which was the same substantially.

36. Notwithstanding my objections on November 16, 1998, three (3) other GEC Members voted to support Member Horecky's motion to certify, as amended. *However,* the third column that was adopted by the Commission by a vote of four (4) incorporated a total ballot count of 48,666. Gubernatorial Team Gutierrez/Bordallo, *however,* only received 24,250 votes, which put their percentage at 49.82%, which was *not* the majority of votes cast under the 1950 Organic Act of Guam requirements. The Gubernatorial Team, under the motion which apparently passed, failed to met the 1950 Organic Act of Guam requirement of 50% + 1 of the votes cast. Further, the 1950 Organic Act of Guam is silent as to whether undercount

ballots should be applied towards the total number of votes cast and I understood that neither the U.S. Supreme Court nor any court in this jurisdiction has resolved this question.

37. Also at the GEC meeting on Monday, November 16, 1998, I understand that Senator, complainant and write-in Senatorial Candidate Angel L.G. Santos was arrested by Guam Police Department Officers at the 1st Floor of the GCIC Building when he attempted to be present at the GEC meeting on the second floor of the GCIC Building. Unbeknownst to me, Senator Santos was held in another GEC Office in a private room. I was never contacted regarding the procedure on effectuating the Open Government Law under which the GEC meeting was being conducted, and the procedures for making it open to the public in conformance with 5 GCA §§8103(a) and (b). At no time did I consent to Senator Santos' arrest, nor did I know that GPD was preventing persons from entering the open meeting at the entrance to the GCIC Building. Had I known I would have objected and stopped the meeting until the matter were resolved.

38. During the meeting of November 16, 1998 at approximately 12:35 p.m. I was handed a document from Ms. Jennifer Martinez, signed by Senator Angel L.G. Santos lodging a complaint and contesting the meeting currently ongoing, which was to entertain the disposition of the election results of which he was a write-in candidate. Based upon his letter, it appeared that he objected to the participation by two (2) GEC members. I then passed the document to the GEC Executive Director who signed received and had it taken to the GEC Chairman. I was not informed that Senator Santos was in custody.

39. Based upon my subsequent understanding that Senator Angel L. G. Santos was arrested for attempting to gain entry in the GEC meeting. I believe that the meeting held on November 16, 1998 was illegal and in violation of the Open Government Law. The alleged certification which was conducted by four (4) of the members was void under 5 GCA §8114, *Action Voided*, and therefore apparently any certification by the GEC may be illegal.

Further affiant sayeth not this 1st day of December, 1998.

/s/ Douglas B. Moylan
DOUGLAS B. MOYLAN

SUBSCRIBED & SWORN to before me this 1st day of December, 1998, by DOUGLAS B. MOYLAN.

/s/ Victoria S. Quichocho
NOTARY PUBLIC

[LOGO]

ELECTION COMMISSION
Territory of Guam
P.O. BOX BG
AGANA, GUAM 96910

TEL: 777-9791
777-9792
777-9793

MINUTES

The Commission met on the 16th day of October, 1974 at 5:15 p.m. in the office of the Election Commission. Present were:

Ms. Priscilla F. Cruz, Chairman
Mr. George Bourland, Member
Mr. Thomas Calvo, Member
Mr. Alberto T. Lamorena, Member
Mr. Jesus Okiyama, Member
Mr. Jack Rosenzweig, Legal Counsel
Mr. A.T. Carbullido, Executive Director
Ms. Ann L. Sablam, Assistant to the Executive Director

The meeting was called to order by the Chairman.

MINUTES

The minutes of October 9, 1974 were presented to the Commission members for their review. Mr. Calvo indicated that he attended the meeting although his name was not listed in the minutes. Mr. Lamorena moved that the minutes be approved subject to further corrections/ seconded by Mr. Bourland/passed.

OLD BUSINESS

Executive Director Mr. Carbullido's letter dated October 11, 1974 to the Chairman regarding the Election Commission's contract with Institute Data was considered by the members. Mr. Carbullido was asked to research the terms of the contract as Mr. Joyner has asked for additional payment for running the Washington Delegate's ballot, although the members felt that this service was covered by the present contract. The contract states that Institute Data shall provide vote tabulation services for the Primary and General elections, which should include the running of the Washington Delegate's ballot. However, the Election Commission informed Mr. Joyner in July that

there would be no ballot for the Washington Delegate and have since reversed this decision. Mr. Joyner states that he has scheduled his computer time so that he does not now have the machine hours available for this service and would have to rent time from another machine. The members decided to advise Mr. Joyner to bill the Commission for the charges he feels he is entitled to. The Commission will pay the charges, subject to having the matter considered on a legal basis.

Procedures for the tabulation center, composed by Ms. Sablan, were presented to the Commission members for their concurrence. The members will study the procedures and make recommendations for changes and [line missing]

Mr. Carbullido advised the members that instructions for the precinct officials are nearly completed and will be distributed to the members for their consideration next week. It was suggested by the members that the precinct officials be instructed that, when they are counting the ballots and separating the void, spoiled and valid ballots, they pull out the ballots which have candidates written in and put them on the bottom of the stack of valid ballots. The purpose of this is that in the event the computer does not pick up write-ins properly, this would be caught if the write-ins are all together.

Mr. Carbullido presented the Commission with a proposal from Mr. Donald Liberty, Manager of the G.C.I.C. Building, for renting additional office space for the two-month period October 15th through December 15th. Mr. Bourland moved that the Commission go ahead with this proposal; the motion was passed by the members.

CORRESPONDENCE

A letter dated October 15, 1974 from senatorial candidate Thomas Tanaka, Jr. requesting that the Commission allow him to retract expenses shown on two of his previous Campaign Statements of Account due to the non-delivery of the goods purchased was considered by the members. Mr. Bourland moved that he be allowed to retract these expenses/passed by the members.

FINANCIAL STATEMENT

The Financial Status Report as of September 30, 1974 for the Election Commission office was presented to the Commission members for their information.

NEW BUSINESS

Two Letters from the Editor which appeared in *Dateline* concerning the performance of the Election Commission were brought to the attention of the members. It was suggested that Mr. Brislin, author of these articles, be asked to pay a visit to the office to inspect the Election Commission expenditures, but the members decided against this. It was the general consensus that if Mr. Brislin is interested in presenting factual information to the public in his editorials, he can take the initiative to gather these facts, which he has not done so far as regards his articles concerning the Election Commission.

GENERAL DISCUSSION

Mr. Carbullido advised the members that there are now a total of 28,853 registered voters in Guam. The Election

Commission has, as of this date, received 269 absentee applications and has sent out 208 ballots. Sixty-eight applications are still under consideration.

During the meeting of October 9th the meaning of the term "majority of votes cast" was discussed by the members. Legal Counsel Mr. Rosenzweig is now directed by the members to try to find a precedent to indicate whether this term means total of *all* votes cast, or total of all *valid* votes cast.

Mr. Okiyama posed a question as to whether expenses for campaign materials purchased for a General Election campaign but not used could be retracted from the candidate's Campaign Statement of Account. The members decided that such a situation would be considered on a case by case basis.

Mr. Calvo asked whether opinion surveys conducted by a candidate would be considered as campaign expense. Legal counsel Mr. Rosenzweig stated that if the survey were conducted in aid of a candidate's campaign, then such a survey would have to be considered an expense.

The meeting was adjourned at 6:35 p.m.

/s/ A.T. Carbullido
A.T. CARBULLIDO

[LOGO] ELECTION COMMISSION
Territory of Guam
P.O. BOX BG
AGANA, GUAM 96910

TEL: 777-9791
777-9792
777-9793

October 9, 1974

AGENDA

MINUTES

October 7, 1974

OLD BUSINESS

1. Letter dated October 7, 1974 from Legal Counsel Jack Rosenzweig to the Commission members regarding questions asked by Edward Gould, Public Relations Manager for the Democratic Party, in his letter of September 29, 1974.
2. Letter dated October 8, 1974 from Governor Camacho to speaker Ramirez of the 12th Guam Legislature explaining why he vetoed Bill 891 containing the Election Commission's Supplemental Budget and transmitting an appropriation bill to cover the Election Commission's requirements.
3. Legal Counsel Mr. Rosenzweig's Complaint for Declaratory Relief submitted to the Superior Court of Guam on October 8th.

NEW BUSINESS

1. *Dateline*'s editorial regarding the Election Commission.
2. Screening of absentee rejects.
3. Review of validity of ballots.

BILLS

1. Bill 936 amending the Government Code relative to campaigning.
2. Bill 944 relative to placing on the 1974 General Election ballot certain special questions.

/s/ A.T. Carbullido
A.T. CARBULLIDO

EXHIBIT [Illegible]

CUNLIFFE & COOK
Attorneys at Law
Suite 200
210 O'Hare Street
Agana, Guam 96910

F. Randall Cunliffe — Telephone: 472-1824
Jeffrey A. Cook — 472-1833

MEMORANDUM

(Received Nov. 4, 1982)

TO: Guam Election Commission

FROM: Legal Counsel

DATE: November 4, 1982

SUBJECT: Runoff Election for November 2, 1982 Governors Election

The Board has requested a legal opinion on whether or not a runoff election is required in the November 2, 1982 governor's election. Specifically the question is whether the Bordallo/Reyes candidacy received a majority of the votes cast pursuant to 48 USC Section 1422. (Section 6 of the Organic Act of Guam).

Section 1422 states that the Governor shall be elected by a majority of the votes cast by the people qualified to vote for the Legislature. It then states that the Governor and Lieutenant Governor shall be chosen jointly, by the casting of a single vote applicable to both offices. "If no candidate receives a majority of the votes cast in any election," there shall be a runoff fourteen (14) days later.

EC Section 9135 states how a voter shall mark his ballot to indicate his vote. EC Section 9145 states that an unmarked ballot should be returned to the precinct official and handled as a spoiled ballot. EC Section 11111 states that any ballot not marked as provided by law shall be void. EC Section 11114 states that if for any reason it is impossible to determine a voter's choice for any office, his ballot shall not be counted for that office, but the rest of his ballot, if properly marked, shall be counted.

It is my opinion that the interpretation of the Organic Act should be that the majority required is of those votes cast in the governor's race alone. Only votes for either party in [sic] write-ins should be considered in the total votes cast. The language of the Act that each voter shall cast a single vote applicable to both offices seems to support this interpretation. If a voter makes no choice for

the office of Governor, he has not cast a vote for the governorship. Moreover, since the Governor's race could be on a separate ballot, Section 9145 supports the position that no vote has been cast, and therefore it should not be part of the total count of votes affecting what number would make a majority.

The language of the Organic Act is not clear on this point. It talks of the majority of votes cast in any election. However, this statement follows directly after the statement that the Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote. Therefore, Congress is implying that the total votes cast be of those cast in the Governor's race.

Section 1711 of 48 USC is more clear on the vote for the Washington representative. It clearly states that the delegate shall be elected by a majority of the votes cast for the office of delegate.

It is my opinion that, although not so clearly stated, Congress intended that the majority of the votes cast in the Governor's race alone would be necessary to win that election.

Respectfully submitted,

CUNLIFFE & COOK

By: /s/ Jeffrey A. Cook
JEFFREY A. COOK
Attorney at Law

JAC/cq

EXHIBIT [Illegible]

LAW OFFICES OF CESAR C. CABOT, P.C.
LEGAL MEMORANDUM

[RECEIVED NOV 06 1998]

TO: Henry A. Torres, Executive Director
Guam Election Commission

FROM: Cesar C. Cabot, Legal Counsel

DATE: November 6, 1998

SUBJECT: Interpretation of the Term "Majority of Votes Cast" Pursuant to the Organic Act of Guam, 48 U.S.C. § 1422

Our office has been instructed to provide the following legal opinion.

I. FACTS

The 1998 General Election was held to elect, among others, the Governor and Lt. Governor of Guam on November 3, 1998. The ballots were duly tabulated and the unofficial results are as follows:

NAME	NO. OF VOTES	PERCENTAGE
a. Carl T.C. Gutierrez/ Madeleine Z. Bordallo	24,159	49.79%
b. Joseph F. Ada/ Felix M. Camacho	21,147	43.58%
c. Write-In Votes Cast	1,291	2.66%
d. Number of Under Votes	1,312	2.70%

c. Number of Over Votes	606	1.24%
f. Total Votes Cast	48,515	100%

II. ISSUE

What shall constitute a "majority of votes cast" pursuant to the Organic Act of Guam (48 U.S.C. § 1422), in determining the requisite number of votes to be declared the winner of the Gubernatorial/Lt. Gubernatorial race during the 1998 General Election?

III. STATUTE AND ANALYSIS

Title 3 Guam Code Annotated § 11132 entitled *"Declaration of Results"*, provides that "immediately after completion of the tabulation of all election results, the Commission shall declare elected to each office the person having the largest number of votes for that office." The threshold standard provided in Section 11132 of the Election Code contrasts sharply with the requirements of the Organic Act of Guam, 48 U.S.C. Subchapter 2, § 1422 (the "Organic Act") which provides in relevant part:

> "the Governor of Guam, together with the Lieutenant Governor, *shall be elected by a majority of the votes cast by the people* who are qualified to vote for the members of the Legislature on Guam. The Governor and Lt. Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidate receives a majority of the votes cast in any election, on the fourteenth day thereafter a

runoff election shall be held between the candidates for Governor and Lt. Governor receiving the highest and second highest number of votes cast." (Emphasis added).

The Election Code also requires the Guam Election Commission ("GEC") to immediately certify the results of the election.

> **§ 11133. Certificate of Election.** Immediately after declaring the results of any election, the Commission shall make or cause to be made "certificates of election" for every person elected to office. The form of such certificates shall be prescribed in the Election Manual. The Commission shall cause to be placed in the hands of the elected person a copy of such certificate which shall constitute evidence of that person's right to office. The Election Commission shall preserve the original certificate for a period of ten (10) years.

The broad grant of legislative power given to Guam in its Organic Act is hedged with the restriction that it may pass no law which shall be inconsistent with the Organic Act or the laws of the United States made applicable to the territory of Guam. Designedly or unwittingly, Section 11132 of the Election Code provides a different threshold standard for declaring the winners of the Gubernatorial/Lt. Gubernatorial race than that provided for in the Organic Act. It is legal counsel's opinion that application of the threshold standard contained in section 11132 of the Election Code to the election of Governor/Lt. Governor is inconsistent with the Organic Act, and the clear mandate of the Organic Act must control.

The GEC has previously addressed the issue of whether blank votes shall be counted as part of the aggregate number of total votes cast, by which to determine the required number of votes to declare a victorious Gubernatorial/Lt. Gubernatorial team. It appears that the first instance was at a GEC meeting held on October 21, 1974. According to the official minutes of said meeting, former GEC legal counsel was asked to report his findings concerning the interpretation of the term "majority of votes cast" as it exists in the Organic Act. Former GEC legal counsel, Jack Rosenzweig, opined that the "majority of votes cast" would indicate the majority of valid votes cast only. The GEC record does not contain a written opinion from Attorney Rosenzweig.

The second occasion appeared to have been by a legal memorandum prepared by former GEC legal counsel Jeffrey A. Cook on November 4, 1982. Attorney Cook provided an interpretation of the term "majority of votes cast". In Attorney Cook's opinion, he indicated that if a voter makes no choice for the office of Governor, he has not cast a vote for the governorship. He further asserts his position that "a blank ballot signifies that no vote has been cast, and therefore it should not be part of the total count of votes affecting what number would make a majority." *GEC Legal Memorandum*, November 4, 1982, by Jeffrey A. Cook, Esq., at page 2.

The previous opinions expressed by former GEC legal counsel appear to indicate the GEC's position on the instant issue in 1974 and 1982. While the aforementioned opinions of 1974 and 1982 set precedent of prior actions of the GEC Board, this Board is free to adopt previous Board policy relating to the instant matter, or to develop

new or amended policies. A review of the GEC record fails to indicate any GEC rule promulgated by any past or present boards pursuant to the Administrative Adjudication Act directly on this issue.

A comprehensive, but not exhaustive, review of cases before the Superior Court of Guam, Supreme Court of Guam, and the District Court of Guam, appear to indicate that this matter has never been squarely addressed by any Guam courts.[1]

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[1] While it appears that the Guam Courts have never squarely addressed the present issue, the Decision and Order issued by the Superior Court in the case of *Meno v. Guam Election Commission*, Civil Case No. CV1195-96, contains mention of the Organic Act requirements for election of the Guam Governor and Lieutenant Governor. In the Decision rendered by the Honorable Joaquin V.E. Manibusan, Judge of the Superior Court, on November 4, 1996, the Court examined the applicability of the "Santos Amendment" to the tabulation of initiative measure votes placed upon the ballot during the 1996 election. Said Decision and Order contained dicta in which the Court found that the requirement of majority votes necessary to pass an initiative measure pursuant to the Election Code was similar to that required by the Organic Act § 1422 involving the election of Governors and Lieutenant Governors. Judge Manibusan opined that the language contained in the Organic Act § 1422 appears to require that more than a mere majority of votes is required for the election of the Governor and Lieutenant Governor, and that "rather it appears that a majority of all the votes cast by registered voters is required. This is similar to the requirement which is set out in the Santos Amendment." *See* Decision and order, *Meno v. GEC, et al.*, Superior Court of Guam, Civil Case No. CV1195-96 issued on November 4, 1996 at pages 11-12. It is legal counsel's opinion that the aforementioned opinion of Judge Manibusan constitutes dicta, which are opinions of a Judge which do not embody the resolution or determination of the central issues before the court. The Court

It is important to note that neither the Organic nor the Election Code (Title 3, Guam Code Annotated) provide for a definition of the term "majority of votes cast".

Assorted jurisdictions throughout the United States have reached varying conclusions on the nature of the popular majority required, often based upon the distinct wording of the statute being interpreted. Some state courts have chosen not to include blank ballots in determining the aggregate number of votes cast from which the required number of votes to constitute a majority is determined. *See Todman Supervisor of Elections of the U.S. Virgin Island, et al., v. Boschulte, et al.*, 694 F.2d 939 (3rd Cir. 1982). Other courts have included blank and spoiled ballots in determining the aggregate amount in its analysis of the instant issue. *Hawaii State AFL/CIO, et al. v. Yoshina et al.*, 84 Haw. 374, 935 P.2d 89 (Supreme Court of Hawaii 1997); *People ex rel. Hewitt v. Cincinnati L. & C. Ry. Company*, 256 Ill. 280, 100 N.E. 208 (1912) (holding that levy of road tax was illegal where statute required "a majority of all the ballots cast at said election" to approve a road tax, and although a majority of those voting "yes" or "no" on the tax voted in favor, it failed to receive a majority of ballots cast at the election, where the aggregate amount included blank and spoiled ballots).

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in its ruling above did not make a final determination as to whether blank ballots would be counted as "no votes" pursuant to the "Santos Amendment" in tabulating votes for or against a proposed Initiative Measure appearing on the election ballot, and likewise did not rule out the possibility. While the central issue of the *Meno* case was distinct from the issues in this instant opinion, the determination of the court gives us some insight on how the Guam Courts may find, should this [LINE MISSING].

The *Todman* case aforementioned was rendered by the Third Circuit Court of Appeals and interpreted the Organic Act of the Virgin Islands. *See Todman, Supervisor of Elections of the U.S. Virgin Islands, et al., v. Boschulte, et al.*, 694 F.2d 939 (3rd Cir. 1982). The Third Circuit Court of Appeals ruled that ballots which were left entirely blank or which were blank as to Governor and Lieutenant Governor were not to be counted in computing the majority of votes cast in the Virgin Islands elections. The *Todman* case is persuasive in that the Third Circuit was interpreting a section from the Virgin Islands Organic Act which is strikingly similar to the Organic Act.[2] The *Todman* decision originated from the Third Circuit, and Guam cases are heard by the Ninth Circuit Court of Appeals. As such, the *Todman* case is persuasive, but not controlling with regard to interpretation of Guam statutes.

Equally persuasive is the case of *Hawaii State AFL/CIO, et al., v. Yoshina, et al.*, in which the Hawaii Supreme Court ruled that the term "majority of votes cast" shall be interpreted according to the plain and natural meaning of the statute, which shall include blank and spoiled ballots, *Hawaii State AFL/CIO, et al., v. Yoshina*, 84 Haw. 374, 935 P.2d 89 (Supreme Court of Hawaii 1997). In the *Yoshina* case, the Hawaii Supreme Court held that the definition of "majority of ballots cast" should be accorded its natural and plain meaning.

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[2] Section 11 of the Revised Organic Act of 1954, 48 U.S.C. § 1591 (the "Organic Act of the Virgin Islands") provides that "the Governor of the Virgin Islands, together with the Lieutenant Governor, shall be elected by a [LINE MISSING].

The Hawaii Supreme Court reasoned that words used in a statute, if they are clear and unambiguous, are to be construed as they are written. Further, the court held that the words in a statute are presumed to have been used in their natural sense unless the context furnishes some ground to control, qualify or enlarge them. The Hawaii statute, like the Organic Act, did not provide any definition of the phrase "majority of ballots cast". The Hawaii Supreme Court concluded that a ballot is "cast" without regard to whether the ballot indicated the choice of the voter or was left blank, and that the phrase "ballots cast" in its natural sense, refers to the total number of ballots deposited in the ballot box, including blank ballots and over votes.

Like the *Todman* case, the *Yoshina* case appears persuasive, but is not controlling upon Guam Courts. In the limited time available, legal counsel has not discovered cases from other jurisdictions entirely dispositive of the issues in this opinion.

IV. CONCLUSION

In summary, the review of relevant case law from other jurisdictions indicate that the term "majority of votes cast" is capable of more than one interpretation, by various courts throughout the United States and its Territories. Neither the Organic Act nor the election Code (Title 3 of the Guam Code Annotated) contain any definition of the term "majority of votes cast", or of the separate words comprising such phrase. There do not appear to be any decisions from Guam courts squarely addressing the issues dealt with in this opinion and, as such, the

GEC has very little by which to guide its interpretation of the phrase "majority of votes cast" as found in the Organic Act.

The GEC has previously addressed the instant issue in 1974 and 1982. In 1974, the GEC set "policy" that blank votes should not be counted toward the aggregate amount by which the number of votes necessary to declare a winner in the Gubernatorial/Lieutenant Gubernatorial race would be determined. In 1982, former GEC legal counsel, Jeffery A. Cook, Esq., provided a legal opinion, in which Attorney Cook expressed that a blank ballot signifies that no vote has been cast and, therefore, should not be part of the total count of votes affecting the number that would constitute a majority.

The prior opinions of former GEC legal counsel indicate the GEC's position on the instant issue in 1974 and 1982. It is legal counsel's opinion that the prior actions of the GEC in 1974 and 1982 are not binding upon the present Board, and that this GEC Board is free to adopt previous board "policy" to the instant matter, or to develop new or amended policies. Legal counsel is also of the opinion that based on the aforementioned, there exist no compelling reason to disturb the prior rulings of former GEC legal counsel, Jack Rosenzweig, Esq., rendered in 1974, and the Jeffrey A. Cook, Esq., legal opinion of 1982. As such, the prior opinions of legal counsels shall stand as the existing "policy" of the GEC, unless and until revised by the GEC Board.

I hope this meets the satisfaction of the Board. If you have any questions or comments, please feel free to contact me.

/s/ Cesar C. Cabot
CESAR C. CABOT
Legal Counsel

CCC:me
M983166.CCC

EXHIBIT [Illegible]

[LOGO] Congressional Research Service • Library of Congress • Washington, D.C. 20540

MEMORANDUM November 9, 1998

TO: Honorable Robert Underwood
Attention: Terry Schroeder

FROM: Kenneth R. Thomas
Legislative Attorney
American Law Division

SUBJECT: Meaning of the Phrase "Majority of Votes Cast" in the Organic Act of Guam

This rush memorandum is in response to your request to determine the meaning of the term "majority of

votes cast" in § 1422 of the Organic Act of Guam.[1] Specifically, you requested a determination as to whether the Governor of Guam, who under the Guam Organic Act must be elected by a "majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam," can be elected by receiving a majority of the votes cast in an election, excluding those ballots that did not indicate a choice for Governor.[2]

This office can find no case law addressing the meaning of the term "majority of the votes cast" in the Organic Act of Guam, and the meaning given to the term "majority" by courts appears to vary based on the particular statutory language in question.[3] In the case of Todman v. Boschulte,[4] however, the United States Court of Appeals for the Third Circuit, interpreting language almost identical to the language in question,[5] held that the phrase "a majority of the votes cast" did not include entirely blank ballots and ballots that were blank as to the position in

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[1] 48 U.S.C. § 1422.

[2] A ballot which did not contain a vote for the governor might be entirely blank or might include votes for other offices, but not for the Office of the Governor.

[3] *See, e.g., Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Haw. 1997) (holding that a majority of "ballots cast upon such questions" shall include blank or invalid ballots.).

[4] 694 F.2d 939 (3rd Cir. 1982).

[5] In *Todman*, the language being analyzed is virtually identical to the language in the Guam Organic Act, save for references to "the Governor of the Virgin Islands" and to the "legislature of the Virgin Islands," 48 U.S.C. § 1591 (the Governor of the Virgin Islands shall be elected by "a majority of the votes cast by the people who are qualified to vote for the members of the legislature of the Virgin Islands.").

question.[6] Although Guam is in the Ninth Circuit, and thus is not bound by this decision, it would appear to be persuasive precedent for the proposition that the majority of votes cast in § 1422 of the Organic Act of Guam would exclude ballots not indicating a choice for Governor.

/s/ Kenneth R. Thomas
Kenneth R. Thomas
Legislative Attorney
American Law Division

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[6] 694 F.2d at 940. The reasoning of the court is that voters not expressing a choice on the matter submitted were "presumed to assent to the expressed will of those attending and voting," and thus were not to be taken into consideration in determining the result, 694 F.2d at 941 quoting *Euwema v. Todman*, 323 F.Supp. 167 (D. V.I. 1971). *See also Republican Party of Hawaii v. Waihee*, 709 P.2d 980 (Haw. 1985) (holding that the phrase "a majority of registered electors who vote on the question" does not include "blank illegal, and unintelligible ballots. . . . "). It would appear that courts are more likely to exclude blank or invalid ballots when a statute speaks to a majority of the number of "votes" rather than a majority of the number of "ballots." *See Hawaii State AFL-CIO v.* [LINE MISSING].

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IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JOSEPH F. ADA and FELIX P. CAMACHO Plaintiff, v. GOVERNMENT OF GUAM, GUAM ELECTION COMMISSION and its commissioners: JOSEPH F. MESA, JOSEPH T. DUENAS, FREDERICK J. HORECKY, DOUGLAS B. MOYLAN, ROSANNA D. SAN MIGUEL, LEONILA L.G. HERRERO Defendant. and, CARL T.C. GUTIERREZ and MADELEINE Z. BORDALLO Real Parties In Interest	CIVIL CASE NO. 98-00066 **REAL PARTIES IN INTERESTS' NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT'S DECEMBER 9, 1998 ORDER** (Filed Dec. 9, 1998)

The Real Parties In Interest, CARL T.C. GUTIERREZ and MADELEINE Z. BORDALLO, ("Appellants") hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered by the U.S. District Court of Guam on December 9, 1998, accepting jurisdiction, and issuing a Writ of Mandamus, ruling that the candidates in the 1998 Guam election who were certified as winners were not elected by a majority of votes cast as required by the Organic Act, 48 U.S.C. § 1422 and ordering that a run-off election be conducted on December 19, 1998. A true and correct copy of the District Court's decision and Order is attached to the Civil Appeals Docketing Statement.

Dated this 9th day of December, 1998.

Respectfully submitted,

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Supreme Court of the United States

No. 99-51

Carl T. C. Gutierrez and
Madeleine Z. Bordallo,

Petitioners

v.

Joseph F. Ada and Felix P. Camacho

ORDER ALLOWING CERTIORARI.
Filed September 10, 1999.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The brief of the petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 29, 1999. Rule 29.2 does not apply.

September 10, 1999

Supreme Court, U.S.
FILED
OCT 20 1999
CLERK

No. 99-51

In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Did the Ninth Circuit prejudicially err in holding that the first paragraph of the Organic Act of Guam (48 U.S.C. § 1422), which is applicable solely to gubernatorial elections and requires runoff elections only when a gubernatorial slate has not received a majority of votes in that election, forced a runoff election despite petitioners having received the majority of all valid votes cast in the gubernatorial race

(1) by rewriting the statutory words "in any election" to state "in any general election in which the gubernatorial election is a part,"

(2) by rewriting the statutory words a "majority of the votes cast in any election" to mean a "majority of ballots cast in any general election," and

(3) by counting as "votes" ballots that are invalid under Guam election statutes, thereby placing the Ninth Circuit in direct conflict with the Third Circuit's interpretation of the identical language of the Virgin Islands Organic Act (48 U.S.C. § 1591) in *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982)?

PARTIES

The parties are petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo and respondents Joseph F. Ada and Felix P. Camacho.[1]

[1] The Government of Guam and the Guam Election Commission and its Commissioners were named as defendants in the proceeding in the United States District Court for the District of Guam, but they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit and are not parties to the proceeding before this Court.

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PETITIONERS' OPENING BRIEF ON THE MERITS

This Court's order granting certiorari is published at 68 U.S.L.W. 3153, 1999 U.S. LEXIS 4724, 1999 WL 459546 (Sept. 10, 1999).

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 179 F.3d 672 (9th Cir. 1999). (Appendix to Petition for Writ of Certiorari ("Pet. App.") A-1.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (Pet. App. A-61.)

The opinion and order of the United States District Court for the District of Guam is unpublished. (Pet. App. A-24.) The decision and order of the Superior Court of Guam in *Ada v. Gutierrez*, No. CV 2765-98 (Feb. 16, 1999), is unpublished. (Appellants' Additional Citations, filed Feb. 24, 1999.)

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 19, 1999. That court denied a timely petition for rehearing and suggestion for hearing en banc on May 25, 1999. The petition for a writ of certiorari was filed on July 2, 1999. This Court granted the petition for a writ of certiorari on September 10, 1999.

The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 48 U.S.C. § 1422.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Federal Statutes

The Organic Act of Guam, 48 U.S.C. § 1422, first paragraph, provides:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.[2]

The Virgin Islands Organic Act, 48 U.S.C. § 1591, first paragraph, provides in pertinent part:

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[2] The remainder of Section 1422 is unrelated to gubernatorial elections.

> The Governor of the Virgin Islands, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the legislature of the Virgin Islands. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

The Organic Act of Guam, codified as 48 U.S.C. § 1423a, provides in pertinent part:

> The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. . . .

The same Act, codified as 48 U.S.C. § 1423i, provides in pertinent part:

> Every bill passed by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor. If he approves it, he shall sign it. . . . The Congress of the United States reserves the power and authority to annul the same.

Before its amendment in 1968, § 1423i provided in the last sentence:

> If any such law is not annulled by the Congress of the United States within one year of the date

of its receipt by that body, it shall be deemed to have been approved.

B. Guam Election Statutes

Title 3 of the Guam Code Annotated ("G.C.A."), § 11111 provides:

> At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.[3]

Title 3 of G.C.A. § 11114 provides:

> If a voter indicates either:
>
> (a) By placing his marks in the voting squares adjacent to the names of any candidates, or
>
> (b) By writing the names of persons for an office in the blank spaces, or
>
> (c) By a combination of both, the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for

[3] This statute was derived from the Guam Code § 2518 enacted in 1952. Section 2518 was repealed and added by P.L. 7-164, effective August 28, 1964. Section 2518 was then repealed and re-enacted by P.L. 11-209, effective January 1, 1973, recodified as Guam Code § 2511. Section 2511 was thereafter recodified as 3 G.C.A. § 11111. No substantive changes were made during this legislative history.

> that office, but the rest of his ballot, if properly marked, shall be counted.[4]

Title 3 of G.C.A. § 11123 provides:

> As soon as all the votes for such precinct are counted and the ballots sealed, the Election Commission shall certify the results of the election in that precinct. The final certification shall be signed by a majority of the Commission.[5]

STATEMENT OF THE CASE

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") ran against Joseph F. Ada and Felix P. Camacho ("Ada") for the offices of Governor and Lieutenant Governor, respectively. Only two gubernatorial slates were running. (Joint Appendix ("J.A.") 16.) Pursuant to 48 U.S.C. § 1422, each voter who chose to vote in the

[4] Section 11114 was derived from former Guam Code § 2520 enacted in 1952. That statute was repealed and added by P.L. 7-164, effective August 28, 1964 and thereafter amended by P.L. 8-54, effective August 7, 1965. Guam Code § 2520 was thereafter repealed and re-enacted by P.L. 11-209, effective January 1, 1973, as amended by P.L. 12-149, effective June 19, 1974 and redesignated as Guam Code § 2514. Guam Code § 2520 and Guam Code § 2514 are identical. Guam Code § 2514 was thereafter recodified without any language change as 3 G.C.A. § 11114.

[5] Section 11123 was initially enacted in 1952. It was repealed and added by P.L. 7-164, effective August 28, 1964. It was thereafter repealed and re-enacted by P.L. 11-209, effective January 1, 1973, and thereafter codified as 3 G.C.A. § 11123. No change in language occurred.

gubernatorial race was to cast a single vote for the two offices on the slate.

Although more than 1,000,000 votes were cast for various candidates in all the races in the general election, less than 50,000 votes were cast in the gubernatorial contest.[6] The Gutierrez slate received 24,250 votes, and the Ada slate received 21,200 votes, giving Gutierrez a marginal 3,050 votes. (J.A. 16.) Of the additional persons who voted for offices other than Governor and Lieutenant Governor, 1,313 persons left the gubernatorial spaces blank, 609 persons voted for both slates, and 1,294 persons filled in the space indicating that they intended to vote for a write-in candidate. (J.A. 16.) However, of the 1,294 persons indicating they intended to vote for a write-in candidate for governor, only 275 wrote in the name of any candidate. (J.A. 16.) Thus, 1,019 of those "write-in" ballots contained no vote in the gubernatorial election. (Declaration of Joseph T. Duenas, filed Dec. 9, 1998 (Rec. No. 29-1), at page 2, ¶ 7.)[7]

The total number of ballots returned with respect to all races was 48,666. The Guam Election Commission

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[6] The November 3, 1998 general election consisted of four races: (1) the gubernatorial election, (2) election to the Guam Legislature, (3) election of the United States Delegate, and (4) election of the school board. All four races were consolidated on one ballot. The 1,000,000 total votes is reached by adding every vote in all four races. (J.A. 16-20.)

[7] If any one of these three described categories of "votes" – (1) the 1,313 blank ballots, (2) the 609 double-voted ballots, or (3) the 1,019 "write-in" ballots with no candidate named – should have been excluded by the Guam Election Commission, the Gutierrez slate won.

deducted the 1,313 ballots that were blank with respect to the gubernatorial race. The Commission then certified that the Gutierrez slate had won, with 51.21% of the votes cast (24,250/47,353 = 51.21%). (Pet. App. A-25.)[8]

On December 1, 1998, Ada filed a complaint in the United States District Court for the District of Guam seeking a declaration that the Gutierrez slate had not won and for mandamus to compel a runoff election. (J.A. 5.) On that same day Ada also filed a lawsuit in the Guam Superior Court alleging voting irregularities and challenging the Guam Election Commission's certification. *Ada v. Gutierrez*, No. CV 2765-98 (Guam Super. Ct.). (See Appellants' Additional Citations, filed Feb. 24, 1999, at page 1.)

On December 9, 1998, the district court ruled in Ada's favor. The court held that all *ballots* in the *general election* had to be counted as "votes cast" in the gubernatorial race to determine a majority, including those on which no gubernatorial vote was cast or which were invalid because they contained overvotes. As thus construed, the district court held that Gutierrez failed by 83

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[8] The Election Commission did not reach the question whether the 609 persons who voted for both slates ("overvotes") should be counted for either or neither of the slates; nor did the Commission make any decision with respect to those persons who indicated they intended to vote for a write-in candidate, but who did not name a candidate. By deciding that the 1,313 persons who left the gubernatorial spaces blank had not cast any vote in the gubernatorial race, the Gutierrez slate won without reaching the question of validity of overvotes or voters who failed to write in names of other candidates.

votes to achieve a majority, and it ordered a runoff election to be held on December 19, 1998. (Pet. App. A-53 – A-55.)[9]

The Gutierrez slate immediately filed an appeal and an emergency motion to stay the runoff election. By unpublished order the court of appeals granted the stay motion, on December 15, 1998. (Pet. App. A-57.)

On February 16, 1999, the Guam Superior Court found that Ada had failed to prove the allegations of election irregularities; it held that the Gutierrez slate had won. *Ada v. Gutierrez*, No. CV 2765-98 (Guam Super. Ct.). (Appellants' Additional Citations, filed Feb. 24, 1999.) Ada appealed.[10]

The Court of Appeals for the Ninth Circuit affirmed the district court's decision by an opinion filed April 19, 1999. 179 F.3d 672 (9th Cir. 1999). (Pet. App. A-1.)[11] The court reached three erroneous conclusions:

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[9] By thus counting ballots blank as to the gubernatorial race, ballots indicating a desire to write in gubernatorial names which thereafter contained no such names, and ballots on which votes were cast for both slates, the district court concluded that 24,333 votes were necessary for Gutierrez to receive a majority. (See Pet. App. A-25.)

[10] That appeal has been scheduled for argument before the Guam Supreme Court the first week of November, 1999.

[11] No mandate has gone down because the court of appeals stayed its mandate pending the filing of the certiorari petition; and the stay continued when the certiorari petition was filed and thereafter granted. (Order, filed May 27, 1999; Order, filed July 21, 1999.)

(1) The words "in any election" as used in the clause "[i]f no candidates receive a majority of the votes cast *in any election*" [emphasis added] could *not* refer to the gubernatorial election because the words "in any election" would thereby be "a nullity." (Pet. App. A-9.)

(2) By the words "in any election" Congress meant the general election of which the gubernatorial election was a part. (Pet. App. A-9 – A-10.)

(3) Although the court acknowledged that counting all of the "votes cast" at the general election to determine the gubernatorial race would reach an "absurd result" unintended by Congress, it could avoid the absurdity by reading the words "votes cast" as if Congress had said "ballots issued and returned in the general election." (Pet. App. A-10 & n.5.)

SUMMARY OF THE ARGUMENT

The Ninth Circuit seriously misconstrued Section 1422. In context, the phrase "in any election" plainly means "in any *gubernatorial* election," beginning with the first gubernatorial race in which no other contest was on the ballot and thereafter in every gubernatorial election held concurrently with the general election. In context, the phrase "majority of the votes cast" plainly means the majority of the votes cast in the gubernatorial race "by the casting by each voter of a single vote applicable to both offices."

The court below recognized that its construction of the statute leads to an absurdity that Congress did not intend. It unsuccessfully tried to avoid the absurdity by impermissibly rewriting Section 1422 to change the words "votes cast" in the gubernatorial election to "ballots cast" at the general election. Congress knew the difference between "ballots" and "votes." Moreover, it was aware that separate ballots had been used in Guam not only in gubernatorial elections, but also in elections for Guam's Delegate to Congress. It had no intention to change the results of gubernatorial elections based on whether ballots were or were not separate for gubernatorial elections and any other contests in a general election.

By counting as "votes cast" in the gubernatorial election ballots on which voters made no discernible choice in that race, the court violated the election law presumption settled since this Court decided *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877): Voters who do not choose to vote in a particular race are presumed to assent to the will of those persons who do vote in that contest.

The decision below is in conflict with the Third Circuit on the election law point. In *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), the court construed the language of the Organic Act of the Virgin Islands, 48 U.S.C. § 1591, which is identical to that appearing in Section 1422; and it held that entirely blank ballots and ballots blank as to the gubernatorial race could not be counted in computing the majority in an election. Votes which are not cast cannot be deemed "votes cast" in that contest.

The Ninth Circuit erroneously disregarded or invalidated the applicable election laws of Guam, theretofore approved by Congress, with respect to the validity of votes cast in Guam elections. Guam election statutes do not permit to be counted votes that are blank in the gubernatorial race or ballots on which voters made no discernible choice in that election.

Congress never intended to require a runoff election when only two gubernatorial slates ran against each other. The runoff provision was intended to foreclose election of a gubernatorial slate by a mere plurality when one slate in a multi-slate contest received less than the majority of the votes validly and actually cast.

ARGUMENT

I. THE COURT MISREAD SECTION 1422 AND THEREAFTER REWROTE THE STATUTE IN A VAIN ATTEMPT TO AVOID THE ABSURDITY THAT ITS MISCONSTRUCTION CREATED

Introduction. According to the court of appeals, the Guam Election Commission should not have tallied the valid votes for each gubernatorial slate and votes cast for write-in candidates and compared the totals with one another to determine whether either slate had won a majority; instead, it should have tallied the votes cast for both slates and compared those totals with all of the "ballots cast" in which a vote had been cast for any candidate in any race in the general election, to decide whether either slate had won a majority in the gubernatorial election. In reaching its startling conclusions, the

court isolated three words from the five key sentences in the first paragraph of Section 1422, disregarded the context in which the words were used, and substantively rewrote the statute to try to escape the "absurdity" that its misconstruction created. If not overturned, the decision subjects the citizens of Guam to the prospect of unnecessary, wasteful and politically destabilizing gubernatorial runoffs in this election and in every future gubernatorial election.

A. The Court Misconstrued the Words "In Any Election" in Section 1422

Congressional intent in using the words "in any election" is evident when the key sentences are read together – Congress meant "in any *gubernatorial* election":

> The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election.

48 U.S.C. § 1422 (emphasis added).

The phrase "in any election" in the second quoted sentence could refer only to candidates in the gubernatorial election because the same sentence refers to a "runoff election" for Governor and Lieutenant Governor; no such runoff election could occur in any other contest on the general ballot.

The only mention of the general election is in the last sentence; and Congress' only purpose in referring to the general election in the last sentence was to set the *time* for later gubernatorial elections, just as it had set the date for the first election in the immediately preceding sentence and set the time for runoff elections earlier in the same paragraph.

The "majority of the votes cast" plainly means a majority of the votes cast for Governor and Lieutenant Governor. The immediately preceding sentence not only specifies that the Governor and Lieutenant Governor are chosen jointly, it also specifies the manner in which each voter shall cast a vote in that race, *i.e.*, "by the casting by each voter of a single vote applicable to both offices." No other federal statute and no local statute applicable to this general election required a single vote for two offices.

The last two sentences quoted establish that the words "in any election" referred to the first election on November 3, 1970 (restricted to the first gubernatorial contest) and thereafter to every succeeding quadrennial election for Governor and Lieutenant Governor to be held concurrently with the general election.

Rather than construing together those simple declarative sentences of the statute, the court changed the words "in any election" into a pivot on which the whole

paragraph turns, thereby disregarding standard principles of statutory construction:

> Section 1422 provides for a runoff election in the event that "no candidates receive a majority of the votes cast in any election." Because Congress provided no other direction in § 1422 for determining what constitutes a majority, we must give effect to these words. We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor. (Pet. App. A-8 – A-9.)
>
> • • •
>
> This phrase ["by the casting by each voter of a single vote applicable to both offices"] merely establishes the requirement that candidates for governor and lieutenant governor run on a single slate. It is the sentence using the phrase "in any election" that establishes the majority requirement and, therefore, that should be accorded greater weight. The better interpretation is that Congress intended "votes cast" to constitute the votes cast for *any* of the offices up for election at that general election; that is, the number of ballots cast. (Pet. App. A-9 – A-10 (emphasis in original).)

The phrase "in any election," meaning "in any gubernatorial election," is not a nullity; it is the simple and logical way to state that in each gubernatorial election the majority test will be applied to the votes in that election. The statute provides for many gubernatorial elections –

the first on November 3, 1970, and one every four years thereafter.

The court incorrectly stated that the words "Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices" in the statute "merely establishes a requirement that candidates for governor and lieutenant governor run on a single slate." "Merely" is out of place. The provision establishes that requirement, but it does more: The entire section is also unmistakably based on the premise that *a vote is cast* by making an *actual selection on the ballot*. A vote is not cast if the voter does not cast one vote applicable to both offices.

The court acknowledged that its interpretation of the statute resulted in an absurdity which "strongly suggests that this was not Congress' intent." (Pet. App. A-10, n.5.) That recognition should have – but did not – alert the court that it had not read the statute correctly.

B. The Court Impermissibly Rewrote Section 1422

After the court cut away the words "in any election" from its contextual mooring, it veered even further off course by rewriting the statute to change "votes cast" in the gubernatorial election to "ballots cast" at the general election:

> Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes

that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely. (Pet. App. A-10, n.5.)

The statute expressly requires votes to be cast in gubernatorial elections in the prescribed manner, and it requires the actual "casting" of a vote. It says nothing whatever about ballots. Who, better than a member of Congress, would know the difference between a ballot and a vote? An assumption that members of Congress failed to distinguish ballots from votes is untenable in the light of legislative history and political reality. Even if the court could have permissibly rewritten the statute (and it could not), its revisions do not eradicate the absurdity which its own construction had created. It makes neither statutory nor common sense to require the Election Commission to count ballots stating no choice for Governor and Lieutenant Governor in order to decide whether voters who did cast their votes for those offices gave a majority of votes to one of the two slates. Votes that are *not* cast do not become cast by "each voter of a single

vote applicable to both offices" as Section 1422 explicitly requires.

Despite the explicit statutory instruction, the court said:

> [T]he text of § 1422 and the differences between it and [48 U.S.C.] § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates. (Pet. App. A-11.)

The court could scarcely have spoken more plainly when it decided that "undervotes" – ballots blank in the gubernatorial elections – were "votes cast."

The Guam Election Commission counted the overvotes solely for the purpose of computing the total ballots cast, but it did not count or allocate the markings on ballots that showed votes for both respective gubernatorial slates. Even if overvotes should have been counted (and they should not, because the votes are invalid under the Guam election statutes), the Gutierrez slate had the majority. If the 609 overvotes were divided 304 votes for the Gutierrez slate and 305 for the Ada slate, the total votes for Gutierrez would be 24,554 or 50.45 percent. (24,554/48,666=50.45%.) The Ada slate would have received 21,505 votes or 44.18 percent. (21,505/48,666=44.18%.) (Indeed, even if each slate is credited with 609 votes, Gutierrez still has a majority.)

C. The Court Overlooked Pertinent Statutory History

Section 1422 of Title 48, initially enacted on August 1, 1950, was amended on September 11, 1968 and October 19, 1982. In 1972, Congress enacted 48 U.S.C. § 1712, requiring that ballots for the election of Guam's Delegate to Congress be printed on separate ballots from any other elective race, even if those contests were held concurrently.[12] By amending Section 1422 in 1982, therefore, Congress could not have intended "votes cast" in the gubernatorial race to mean the majority of "ballots cast" because Congress knew that separate ballots were issued in Guam's elections when the Delegate races were run concurrently with other races in a general election.[13]

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[12] As enacted in 1972, Section 1712 provided, in relevant part:

> The Delegate shall be elected by the people qualified to vote for the members of the legislature of the territory he is to represent at the general election of 1972, and thereafter at such general election every second year thereafter. The Delegate shall be elected at large, by separate ballot and by a majority of the votes cast for the office of Delegate. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes for the office of Delegate. . . .

[13] Under Guam law, enacted in 1952, Guam Government Code § 2384 provided that "one (1) ballot or one set of ballots shall be given to each voter." Guam Government Code § 2384 was re-codified, in identical form, as Title 3 G.C.A. § 9131. The Guam Legislature thus recognized that more than one set of ballots could be furnished to each voter in a general election.

In 1998, Congress amended 48 U.S.C. § 1712, removing the separate ballot requirement for the election of the Guam Delegate, although Congress retained the separate ballot provision as to the Virgin Islands. In pertinent part, Section 1712 now provides:

> The Delegate from the Virgin Islands shall be elected at large, by separate ballot and by a majority of the votes cast for the office of Delegate. The Delegate from Guam shall be elected at large and by a majority of the votes cast for the office of Delegate. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate. . . .

Pursuant to the removal of the separate ballot requirement, as authorized by 48 U.S.C. § 1712, and under the authority of Title 3 G.C.A. § 9131, the Guam Election Commission consolidated all the ballots (Gubernatorial, Senatorial, School Board, and Delegate) in the 1998 general election.

The Ninth Circuit's holding that "votes cast means ballots cast" will therefore produce a different result depending on whether the Guam Election Commission or the Guam Legislature decides to separate or consolidate the ballots. Congress has never manifested any intent to change the outcome of gubernatorial races in Guam depending upon whether gubernatorial ballots were printed separately from ballots in any other contest held at the same time.

II. BY COUNTING AS VOTES CAST IN THE GUBERNATORIAL ELECTION BALLOTS ON WHICH VOTERS MADE NO DISCERNIBLE CHOICE IN THAT RACE, THE COURT VIOLATED SETTLED PRINCIPLES OF ELECTION LAW

A. The Election Law Presumption of This Court Stated in *County of Cass v. Johnston* Controls

Johnston states the basic rule:

> This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

County of Cass v. Johnston, 95 U.S. 360, 369, 24 L.Ed. 416 (1877).

In *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 560, 57 S.Ct. 592, 81 L.Ed. 789 (1937), the Court applied the *Johnston* presumption in deciding whether railway craftsmen had properly elected the Federation to represent them by receiving a majority vote of the affected railroad employees. A majority of petitioner's employees in its mechanical department who chose to vote in the election cast their votes for the Federation. Petitioner challenged certification of the Federation contending that the Railway Labor Act's requirement that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act" meant that a representative must be selected by the votes

of a majority of all eligible voters which included *nonvoting* eligible members. The Court rejected the argument:

> Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County v. Smith*, 111 U.S. 556; *Douglass v. Pike County*, 101 U.S. 677; [additional citations omitted]. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." *Cass County v. Johnston*, 95 U.S. 360, 369, and see *Carroll County v. Smith, supra.*

300 U.S. at 560.

The Court explained the value of adherence to that principle:

> If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives.

Id.

Congress is deemed to have followed relevant judicial interpretations rendered before the statute was passed, unless it makes clear that a different interpretation is intended. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). When Congress initially passed Section 1422 in 1968, it implicitly adopted the *Johnston* presumption: Persons who do not vote are presumed to assent to the will of the majority of those who

have "expressed [the] will of the majority of those voting." *Virginian Railway Co.*, 300 U.S. at 560. The decision below conflicts with election law principles established by this Court and permits indifferent voters to thwart the will of those who cast valid votes for Governor and Lieutenant Governor.

B. The Ninth Circuit Is in Conflict With the Third Circuit on the Election Law Point

In *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), the District Court of the Virgin Islands ordered a runoff election for the offices of Governor and Lieutenant Governor. The revised Organic Act of the Virgin Islands, 48 U.S.C. § 1591, contains language identical to that in Section 1422, except for the name of the Territory. The Board of Elections for the Virgin Islands reported that there were 134 entirely blank ballots and 500 ballots blank as to the offices of Governor and Lieutenant Governor; there were also 922 entirely spoiled ballots and 571 ballots spoiled as to the gubernatorial race. One of several gubernatorial slates had a majority of the votes cast unless the blank ballots and the ballots blank as to Governor and Lieutenant Governor were counted; but the district court required such ballots to be included in computing a majority.

The Third Circuit reversed, holding that entirely blank ballots and ballots blank as to the gubernatorial race could *not* be counted in determining the victors.[14] In reaching its conclusion, the court stated:

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[14] The Third Circuit did not reach the question whether spoiled ballots should be counted, because the elimination of the blank ballots determined the outcome of the election. 694 F.2d at 941.

> [W]e note that in *Euwema v. Todman*, 8 V.I. 224 (D.V.I. 1971), Judge Almeric Christian stated that "the proper basis for computing a majority" was that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." *Id.* at 231. We agree with this statement of the law.

694 F.2d at 941.[15]

C. The Court Incorrectly Invalidated the Applicable Guam Election Laws and Disregarded the Construction of the Applicable Election Laws by the Guam Election Commission and by Congress

The election laws of Guam do not permit blank ballots, "overvotes" (votes for more than one slate in the gubernatorial race) or spoiled ballots to be counted. Sections 11111 and 11114 of the Guam Elections Law provide, respectively, that "any ballot which is not marked as provided by law shall be void," and that, "if for any reason it is impossible to determine [a voter's] choice for any office, his ballot shall not be counted for that office . . . . " Construing the Guam election statutes and 48 U.S.C. § 1422, the Guam Election Commission did not

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[15] The *Euwema* court relied on the election presumption established by *Johnston, supra.*

count as "votes cast" any of the ballots that were blank in the gubernatorial race. By excluding only those blank ballots, the Gutierrez slate had a majority, and the Commission was not required to reach the questions of overvotes or spoiled ballots to decide the outcome.

The Commission's interpretation of both the federal and territorial statutes was entitled to deference because its interpretation was inconsistent neither with the statutory mandate nor with the policy of Congress or of the Guam legislature in enacting those statutes. *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981) ("[t]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court"). The principle was similarly stated in *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) ("[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration").

The court below likewise rejected the House of Representatives' interpretation of the phrase "by a majority of the votes cast" found in 48 U.S.C. § 1712 governing the election of a Guam Delegate to the House. The House adopted Report 99-220 by the Committee on House Administration, dismissing an election contest challenging the Guam Election Commission's certification of Ben Blaz as the winner of the race for Guam's Delegate to the House in November 1984. The contestant, Won Pat,

argued that the Guam Election Commission had misinterpreted the words "majority of the votes cast" because it refused to count overvotes or undervotes in the contest. In reaching its conclusion, the House Committee relied on *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), and on the election laws of Guam. The Committee Report stated:

> The holding in *Todman* enjoys general acceptance in jurisdictions covered by statutory provisions similar or identical to Guam's. This Committee concurs in the logic of *Todman:* a voter who does not mark his ballot is presumed to assent to the choice of those who do.[16]

The House accepted the decision of the Guam Election Commission that blank ballots should not be counted as "votes cast":

> In summary, the decision of the [Guam Election] Commission not to include blank ballots in the total of votes cast is well supported in logic and precedent. Even without the usual deference extended to states and territories in the interpretation of their election codes, the Committee would come to no different conclusion.[17]

Based on the Committee's report, the House passed a resolution dismissing the election contest by the loser.[18]

The court below rejected the Congressional interpretation of "by a majority of the votes cast" in Section 1712 because it said that the statutory provisions defining

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[16] *Dismissing the Election Contest Against Ben Blaz*, H.R. Rep. No. 220, 99th Cong., 1st Sess. (1985).

[17] *Id.*

[18] 99 Cong. Rec. 20180-81 (July 24, 1985).

the relevant majority were different: Section 1712 states that "[t]he Delegate shall be elected . . . . by a majority of the votes cast *for the office of Delegate.*" (Emphasis by the court.)[19] The court concluded:

> Therefore, § 1712's text clearly excludes undervotes, because such ballots do not cast a vote for this particular office. In contrast, § 1422 requires "a majority of the votes cast *in any election.*" § 1422 (emphasis added). At the very least, the text of § 1422 leaves open the possibility that undervotes should be included. (Pet. App. A-13 (emphasis by the court).)

The court below incorrectly assumed that Congress would have used the same language with respect to gubernatorial elections in Section 1422 as it did with respect to the election of the Guam Delegate four years later. Whatever the later Congress may have intended in passing Section 1712 cannot be imputed to an earlier Congress with respect to a different statute. The later Congress unquestionably knew the difference between votes cast and ballots. If the later Congress believed that Section 1422 did not mean valid votes actually cast in the gubernatorial race, it could readily have amended the statute. It did not do so.

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[19] When the House was considering the Blaz contest, Section 1712 provided that an election for the Delegate was by separate ballot. Congress subsequently amended Guam's Organic Act to remove the separate ballot requirement for the Guam Delegate election. See Section I(C), *supra*.

D. The Ninth Circuit Opinion Disregarded Its Own Prior Opinion and 48 U.S.C. §§ 1423a and 1423i

In *Ramsey v. Chaco*, 549 F.2d 1335 (9th Cir. 1977), the court stated:

> Prior to amendment in 1968, however, the Organic Act also provided that all laws enacted by the Guam legislature ultimately should be reported to Congress, and unless Congress acted to annul the law within one year, it was deemed to have congressional approval. Guam Organic Act § 19, ch. 512, § 19, 64 Stat. 389 (1950), *as amended* 48 U.S.C. § 1423i.

549 F.2d at 1338.[20]

The *Ramsey* court decided that a law granting tax rebates passed by the Guam Legislature and submitted to Congress while a pre-1968 Organic Act provision was still in force had received approval under former Section 19 of the Organic Act, because Congress had failed to annul the law within one year. Title 3 G.C.A. §§ 11111, 11114, and 11123 originated from statutes of Guam enacted in 1952 that were re-enacted and recodified without substantive change thereafter. Congress did not annul those pre-1968 statutes within one year; they are, therefore, deemed to have received "approval under former Section 19 of the Organic Act."

Because Congress is deemed to have approved Guam's election statutes, those statutes are not merely

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[20] Section 19 was amended in 1968 to eliminate the provision for implied Congressional approval. *Id.*

the local laws of Guam. Sections 11111, 11114 and 11123 of Title 3 of the Guam Code Annotated require that the only votes that can be counted in the gubernatorial race are those valid votes that have been actually cast in favor of a slate on the ballot or by valid write-in votes for Governor and Lieutenant Governor. Overvotes, votes blank for that race, and ballots on which it is impossible to determine the voter's choice are not counted.

The lower court's cavalier invalidation of significant parts of Guam's election statutes is not sustainable. Congress explicitly reserved to itself, in 48 U.S.C. § 1423i, the right to annul Guam statutes, leaving to the federal judiciary solely invalidation of Guam's election laws under established principles of judicial review. Those election statutes are not inconsistent with anything in Section 1422. In reaching the opposite conclusion, the court read Section 1422 as if Congress intended that when votes in Guam cannot be counted, ballots will be counted. Elections count votes, not pieces of paper in a ballot box.

E. Runoff Elections Were Never Intended To Provide Losers in a Two-Slate Race With a Second Bite at the Election Apple

When there are only two slates in a gubernatorial election, it is senseless to require a "runoff election" between the two slates "receiving the highest and second highest number of votes cast."[21] The purpose of the

[21] Scattered write-in votes cannot change the result because even if the losing party received all the write-in votes, Gutierrez would still have a majority.

runoff provision and the "majority of the votes cast" language was to foreclose election of a gubernatorial slate by a mere plurality when that slate received less than a majority of the votes validly and actually cast for any other slate in the race among more than two slates. That purpose would not be served by counting blank ballots.

CONCLUSION

For all of the reasons hereinabove stated, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and that portion of the judgment affirming the District Court of Guam's order directing runoff elections for Governor and Lieutenant Governor of Guam should be vacated.

Dated: October 20, 1999

Respectfully submitted,

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Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELINE Z. BORDALLO,

Petitioners,

v.

JOSEPH F. ADA and
FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether a statute requiring a majority of the votes cast in any election requires a majority of *all* the votes cast in that election.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents Ada and Camacho[1] supplement petitioners' citations to relevant legal provisions (Gutierrez Merits Brief at 2-5) as follows:

A. Constitutional Provisions

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. Federal Statutes

At the time of its passage in 1968, 48 U.S.C. § 1422a, section 7, provided:

> Any Governor of Guam may be removed from office by a referendum election in which at least two-thirds of the number of persons voting for Governor in the last preceding general election at which a Governor was elected, vote in favor of recall and in which those so voting constitute

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[1] For convenience, plaintiffs and respondents Ada and Camacho hereafter refer to themselves as "respondents" or "Ada" and to petitioners and real parties in interest Gutierrez and Bordallo as "petitioners" or "Gutierrez."

a majority of all those participating in the referendum election. The referendum election shall be initiated by the legislature of Guam following (a) a two-thirds vote of the members of the legislature in favor of a referendum, or (b) a petition for such a referendum to the legislature by registered voters equal to the number to at least 50 per centum of the whole number of votes cast for Governor at the last general election at which a Governor was elected preceding the filing of the petition.

SUMMARY OF ARGUMENT

The decision by a panel of the Court of Appeals for the Ninth Circuit that a runoff election is required for the positions of governor and lieutenant governor of Guam is supported, and indeed compelled, by the plain language of the federal statute, a comparison with other statutes governing voting in Guam, the weight of relevant authority, and the policy objectives that underlie the statute.

The statute at issue, 48 U.S.C. § 1422, requires that a gubernatorial candidate obtain a majority of the "votes cast by the people who are qualified to vote for the members of the Legislature of Guam." There were 48,666 persons so qualified who cast votes in the November, 1998 general election. There is no doubt that petitioners failed to gain a majority of such votes cast.

Section 1422 also states that " . . . [i]f no candidates receive a majority of the votes cast in any election, . . . a runoff election shall be held between the candidates. . . . " The "votes cast in any election" plainly applies to all

48,666 votes cast in Guam's November, 1998 general election. Ballots containing votes for any office are necessarily "votes cast" in a general election. It is immaterial whether those ballots contain votes for gubernatorial offices. They remain "votes cast in any election." There is no other way to read the statutory language.

The Ninth Circuit correctly rejected petitioners' reading – that the statute refers only to votes cast for governor and lieutenant governor – because that reading renders the phrase "in any election" a nullity, contrary to established principles of statutory construction.

The Ninth Circuit buttressed its interpretation by comparing Congress' provision that in the election of a delegate from Guam to the United States Congress, the winning candidate need receive only "a majority of the votes cast *for the office of Delegate*." Congress clearly knew how to state that a majority had to vote for a candidate for a particular office. Its decision not to impose such a requirement but to provide that gubernatorial candidates must receive a majority of all votes cast in an election should be dispositive here.

The same distinction is made in Congress' requirement for a successful recall referendum. A governor of Guam can be removed only by a vote equal to two-thirds of the number who had voted *for the office of governor* at the previous general election. Having taken care to refer specifically to the governor's election in stating the requirements for a recall election, Congress cannot be supposed to have meant the governor's election when it said "any election" in the statute concerning the choice of

the governor. That would impute a degree of carelessness to Congress that has no place in statutory interpretation.

County of Cass v. Johnston, 95 U.S. 360, 366 (1877), while not deciding the question now before the Court, repeated the view that has now prevailed in American jurisprudence for over a century: "[T]here must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question." More important, that rule prevails in California, whose jurisprudence has traditionally been given special deference in Guam. While it is true that the Third Circuit, interpreting a similar statute, supports petitioners' position, respondents will show that the Third Circuit opinion rests entirely on a misreading of a district court opinion which actually supports respondents.

Finally, petitioners argue that Congress cannot have meant what Congress said because that would be irrational. Once again, petitioners ask this Court to replace the statute Congress wrote with one the petitioners would have written. As the Ninth Circuit observed, "[t]he argument that a new election will not change the old should be made to Congress and not the courts." In any event, the statute Congress wrote is eminently rational and serves valid policy objectives. Congress has an interest in seeing that the chief executive and the second-in-command have mustered a majority rather than a mere plurality, an outcome that reinforces the legitimacy of the newly elected persons. Furthermore, a runoff election may well produce a winner who did not have a plurality in the prior inconclusive election.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE TERM "MAJORITY OF THE VOTES CAST" IN 48 U.S.C. § 1422 CANNOT BE LIMITED BY JUDICIAL CONSTRUCTION TO THOSE VOTES CAST IN THE GUBERNATORIAL ELECTION

A. Introduction

Section 1422 requires that to be validly elected, a gubernatorial candidate must garner not merely the largest number of "votes cast" by those who participate in a general election, but a majority of those votes; otherwise, a runoff between the two top vote-getters is required. Voters discontented with the choices offered by the Democratic and Republican parties may write in "None of the above" or the names of half a dozen candidates, none of whom has the remotest chance of winning. In a hotly contested race, a small number of ballots so marked may prove sufficient to deny a majority to either of the two major candidates. Under the statute in question, no candidate could claim victory in the race, and a runoff between the Republican and Democratic candidates would be required.

Logically, the same result must obtain if the write-in votes are cast not for "none of the above" or for splinter candidates, but for Abraham Lincoln, Brad Pitt, or Donald Duck. A vote cast in protest, however futile or even silly, is still a vote cast. This Court has affirmed the constitutional right to the use of write-in ballots at a general election regardless of the candidate's chance of success. *Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S. Ct. 5, 21 L.Ed.2d 24 (1968).

What, however, of the citizen who, finding neither major party gubernatorial candidate palatable, casts a vote for other offices and measures found on the ballot, but chooses the equivalent of "nobody for Governor" by leaving his or her ballot blank as to the gubernatorial race? That is the issue posed by this case. In Guam's general election of November 3, 1998, both write-in and blank ballots were cast in the gubernatorial race. When both types of ballots are counted as "votes cast," neither major party candidate prevailed, and a runoff is required. Concededly, the write-in ballots for governor are included within the number of "votes cast." No rational distinction can be drawn between the political act expressed in marking a ballot with the name of a write-in candidate (who cannot win and may not even exist) and the act of expressing dissatisfaction with the choices offered by leaving that ballot unmarked as to that office.

B. The Language Of 48 U.S.C. § 1422 Compels The Conclusion That A Gubernatorial Candidate Must Obtain A Majority Of The Votes Cast At The General Election

As the Ninth Circuit recognized, in deciding the meaning of the term "majority of the votes cast" as used in § 1422, "the starting point . . . is the language [of the statute] itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, 98 S. Ct. 2923, 57 L.Ed.2d 932 (1978); *Ada v. Gov't of Guam*, 179 F.3d at 672, 676 (9th Cir. 1999). ("We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.") (Citation and internal quotation marks omitted).

Section 1422 contains two sentences which include the term "majority of the votes cast," and it is in those sentences that the meaning of the term is found. The first reads: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the *votes cast by the people who are qualified to vote for the members of the Legislature of Guam.*" (Emphasis added)

Because § 1422 later requires that "the Governor and Lieutenant Governor shall be elected every four years at the general election" the gubernatorial election will always coincide with an election of the Guam Legislature, as was true of the November 3, 1998 election now under examination. As Gutierrez agrees, in the November 3rd general election, "[t]he total number of ballots returned with respect to all races was 48,666." (Gutierrez Merits Brief, at 6). Whether no gubernatorial candidate was named (an "undervote"), or both Democratic and Republican candidates were marked (an "overvote"), or another candidate was written in, each of these 48,666 ballots was a "vote[ ] cast" by a person "qualified to vote for the members of the Legislature of Guam." The language will not bear any other meaning.

The second sentence in § 1422 containing the term "majority" reads as follows: "If no candidates receive a majority of the votes cast *in any election* . . . a runoff election shall be held. . . . " (Emphasis added) The use of the term "any election" plainly supports respondents' reading of the statute.

As the panel below reasoned:

> We read "votes cast" as including all votes cast at the general election, for Congress presumably

> would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor . . . [A contrary] interpretation is problematic because it renders the phrase "in any election" a nullity, and thus violates "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States, 485 U.S. 759, 778, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988)* . . . The better interpretation is that Congress intended "votes cast" to constitute the votes cast for any of the offices up for election at that general election; that is, the number of ballots cast.

179 F.3d at 677.

Gutierrez complains that in equating "votes cast" with "ballots cast" the Court of Appeals "impermissibly rewrote" § 1422. To the contrary, the court simply equated "votes cast" with "votes cast for any of the offices up for election at that general election." The words "ballots cast" merely mean that the votes need not be for governor or lieutenant governor but for any office involved in that election. In any event, the terms "vote" and "ballot" are, as a matter of common usage, entirely fungible.[2] Nothing in the Ninth Circuit's reasoning depends in any

[2] The New Shorter Oxford English Dictionary, for example, defines "vote" as "cast a vote" and "express a choice or preference by ballot." Chambers 20th Century Dictionary likewise defines "vote" as "that by which a choice is expressed, as a ballot," while the Concise American Heritage Dictionary defines ballot as, *inter alia*, "the act, process, or method of voting" and "the total of all votes cast in an election." Equating vote and ballot does no violence to the plain meaning of § 1422.

way upon a distinction between votes and ballots. By using the terms interchangeably, the Ninth Circuit did not rewrite the statute.

Gutierrez's proposed reading of the statute is highly problematical. He contends that Congress intended the two "majority" sentences conjunctively to mean that the Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of only those votes cast "in any gubernatorial election." (Gutierrez Merits Brief, at 12) Thus Gutierrez would severely limit the scope of "any" by placing a qualifying adjective – gubernatorial – where Congress declined to do so. This Court disfavors such a construction. *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (" . . . [W]e ordinarily resist reading words or elements into a statute that do not appear on its face.")

"Any," standing unqualified, means without limit. "Any port in a storm" is not limited to warm-weather ports. Furthermore, tampering with legislative use of the term "any" is a wild horse to ride, as it is quite possibly the term most used in the laws of the United States,[3] and is certainly to be found in a staggering number of federal criminal statutes.[4] These statutes would be radically

[3] Indeed, the term appears in the very constitutional provision most relevant to this case. See U.S. Const. art. VI, cl. 2 (decreeing, *inter alia*, that, " . . . the Judges in every State shall be bound [by the Constitution and laws of the United States], *any* Thing in the Constitution or Laws of *any* State to the Contrary notwithstanding.") (Emphasis added.)

[4] See, e.g., 18 U.S.C. § 1114 (criminalizing slaying of "*any* officer or employee of the United States") (Emphasis added);

altered if the court chose to say that Congress cannot have meant "any" when the court preferred a different rule. That would constitute precisely the sort of "impermissible rewriting" of legislation that Gutierrez so vigorously condemns.

C. Examination Of Other Congressional Provisions Concerning Guam Elections Supports The Ninth Circuit's Reading Of The Statute

If Congress had intended to limit "votes cast" in the manner Gutierrez proposes, it could easily have made that clear by inserting a reference to the gubernatorial election in either or both of the sentences of § 1422 containing the word "majority." Thus the first could have read: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast for those offices." Alternatively, the second sentence might have begun: "If no candidates receive a majority of the votes cast in the election for the offices of Governor and Lieutenant Governor. . . . " Section 1422, however, says nothing of the kind.

Furthermore, when Congress intended that the term "votes cast" mean only those who vote for a particular office in Guam, rather than all those who vote in the

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§ 18 U.S.C. 371 (criminalizing conspiracy "to commit *any* offense against the United States") (Emphasis added); 18 U.S.C. § 1503 (criminalizing certain attempts to influence or intimidate " . . . *any* grand or petit juror, or officer in or of *any* court of the United States, or officer who may be serving at *any* examination or other proceeding before *any* United States magistrate judge or other committing magistrate . . . ") (Emphasis added).

general election, it has spoken in unambiguous terms. The Ninth Circuit made this point succinctly:

> Our interpretation is buttressed by a comparison of § 1422 to 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to the United States Congress. See 48 U.S.C. § 1712 (1987). In contrast to § 1422, § 1712 expressly requires that a candidate receive "a majority of the votes cast for the office of Delegate." Section 1712 provides in relevant part:
>
> > The Delegate shall be elected at large, by separate ballot and by *a majority of the votes cast for the office of Delegate*. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate.
>
> *Id.* (emphasis added).

The Ninth Circuit panel drew the inescapable conclusion from this divergent statutory language:

> If Congress had intended a gubernatorial slate to require only a majority of the votes cast for governor and lieutenant governor, presumably, it would have used language similar to that used in § 1712. Furthermore, given the fact that § 1422 and § 1712 involve the closely-related subjects of the election of Guam's governor, lieutenant governor, and delegate to Congress, it can be inferred that, by employing such clearly different language, Congress intended to depart from the scheme fashioned in § 1422, when it enacted § 1712 four years later.

> In sum, the text of § 1422 and the differences between it and § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates.

179 F.3d at 677-678.

Similarly, in the same legislative act that created the majority requirement of 48 U.S.C. § 1422, Congress provided in § 1422a for the removal by referendum of the governor of Guam by expressly requiring a vote equal to two-thirds of the number who had voted *for the office of governor* at the previous general election.[5] Having taken care to refer specifically to the governor's election when stating the requirements for recall in § 1422a, Congress cannot be supposed somehow to have altered the very different requirement under § 1422 to conform with

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[5] At the time of its passage, § 1422a provided, in relevant part:

> Any Governor of Guam may be removed from office by a referendum election *in which at least two-thirds of the number of persons voting for Governor in the last preceding general election at which a Governor was elected, vote in favor of recall and in which those so voting constitute a majority of all those participating in the referendum election* . . .

1968 U.S. Cong. and Adm. News, p. 3278 (Emphasis added); see also 48 U.S.C.A. § 1422a, *Historical and Statutory Notes*. 48 U.S.C. § 1422a codified section one of the Guam Elective Governor Act, Public Law 90-497, which Congress enacted on September 11, 1968. The election provision disputed here – 48 U.S.C. § 1422 – codified section two of the same Act. *Id.*

the recall provision. Different language in related provisions is to be taken seriously as intending different results.[6]

In *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), this Court used related legislation in determining the meaning of a term in a federal drug statute. *Bailey* raised the issue of whether the possession of a firearm during a drug trafficking offense satisfied the "use of a firearm" element of a five-year mandatory minimum sentencing provision. This Court held that the conduct of possessing a firearm with the intent to use it, on the one hand, and its actual use, on the other, could not be equated, because:

> [h]ad Congress intended possession alone to trigger liability under 924(c)(1), it easily could have so provided. This obvious conclusion is supported by the frequent use of the term possess in the gun-crime statutes to describe prohibited gun-related conduct.

Id., 516 U.S. at 143.

For all of these reasons, the term "majority of the votes cast" in 48 U.S.C. § 1422 necessarily refers to a majority of all those who cast a vote for any office in the general election. As will now be demonstrated, the Ninth Circuit's analysis of the text of the statute is in accord with the weight of authority on the definition of an electoral majority.[7]

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[6] *See Bates v. United States*, 522 U.S. at 29-30 ("As this Court has reiterated: 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (Citations omitted).

[7] The amicus invokes *Jose v. Mesa* 503 F.2d 1048 (9th Cir. 1974) in its effort to bolster petitioners' proposed reading of

II. THE WEIGHT OF RELEVANT AUTHORITY RECOGNIZES THAT ALL THOSE WHO CAST VOTES AT A GENERAL ELECTION MUST BE COUNTED IN DETERMINING THE EXISTENCE OF A MAJORITY

A. *County of Cass v. Johnston* Supports The Lower Courts' Treatment Of Those Who Voted In The General Election But Did Not State A Preference In The Gubernatorial Contest

Petitioners and the amicus argue that *County of Cass v. Johnston*, 95 U.S. 360 (1877) required the Guam election commission to disregard the ballots of those who cast votes at the general election but declined to indicate a

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§ 1422. *Jose* involved a Guam election statute which permitted a gubernatorial slate to win nomination for the general election by obtaining a plurality of votes cast at a primary election. The appellant challenged the statute as invalid in light of the majority requirement set forth in 48 U.S.C. § 1422, but the Ninth Circuit upheld it on the grounds that the draftsmen of § 1422 " . . . meant general election" [rather than primary election] by the use of the term 'election' throughout this section . . . " *Id.*, 503 F.2d at 1049. In *Jose* the Ninth Circuit simply read the term "election" in § 1422 to mean "general election." That is the same reading of the statute which led the panel below to rule in favor of respondents Ada and Camacho.

Also cited by the amicus is *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997). *Foster* involved a Louisiana statute which provided, *inter alia*, for the election of " ' . . . a candidate [for United States senator] who receives a majority of the votes cast *for an office* in a primary election . . . ' ". *Id.*, 522 U.S. at 73 (Emphasis added) This Court found the statute invalid because it conflicted with federal statutes (2 U.S.C. §§ 1,7) governing the timing of federal elections. *Foster* does not remotely implicate the issue presented by the language employed in § 1422.

preference in the race for governor and lieutenant governor. (Gutierrez Merits Brief, at 20-22) The reliance of petitioners and amicus on *Cass* is mysterious since the case rested upon Missouri law rather than federal or Guamanian law. In any event, *Cass*, if it were relevant, would support respondents.

Cass addressed the issue of whether those who do not go to the polls must be included in the numeric base from which a two-thirds majority is determined; the question before the Court was *not* whether one who participates in the election by casting a blank or defective ballot is to be included in that base. The Missouri constitution required that the issuance of county bonds be approved by "two-thirds of the qualified voters of the town, at a regular or special election . . . " *Cass*, 95 U.S. at 365. The bonds held by plaintiffs had been approved under a statute which required only a two-thirds majority of all votes cast in the election.

This Court found that the majority issue was well-settled by Missouri case law. "All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise declares." *Id.* at 369. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 560, 57 S.Ct. 592, 81 L.Ed. 789 (1937), also cited by Gutierrez, is to the same effect.

While the question of whether blank ballots are to be included in the base from which a majority is determined was not before the Court in *Cass*, it was at issue in *State v. Winkelmeier*, 35 Mo. 103 (1864), another Missouri case

upon which *Cass* relied in deciding the "stay at home" question. *Cass* noted that in *Winkelmeier*, the Supreme Court of Missouri held a regulatory measure had failed because "there must be a majority of the voters *participating in the election at which the vote was taken*, and not merely a majority of those voting upon that particular question." *Cass*, 95 U.S. at 366 (Italics added).[8]

Under Missouri law, those who stayed home were apples, those who cast blank ballots on a specific question were oranges. To the extent that *Cass* provides guidance on the question now before this Court, it strongly supports the holdings of the district court and Ninth Circuit.

B. The Clear Weight Of Authority From Other Jurisdictions After *Cass* Holds That Where A Statute Requires A Candidate To Obtain A Majority Of Votes Returned In A General Election, All Votes Cast In That Election Must Be Tallied For Purposes Of Deciding Whether The Candidate Has Achieved That Majority

The rule discussed in *Cass* and stated in *Winkelmeier*, that there must be a majority of the voters participating in the election at which the vote was taken and not merely a majority of those who voted on that particular question, has endured for well more than a century and

[8] In *Winkelmeier*, thirteen thousand voters had participated in a general election. One measure on the ballot in that general election proposed the sale of refreshments on any day of the week; by statute, a "majority of the legal voters of the city" was required for approval. Five thousand votes were cast in favor of the measure, while two thousand opposed its passage.

controls the result in the present case. In *Thurston County Farm Bureau v. Thurston County*, 136 Neb. 575 (Neb. 1939), noted by the district court below (Pet. App. A-45), the Nebraska Supreme Court considered whether a proposition placed on the ballot in a general election to approve annual appropriations for agricultural extension work had been carried by a "majority" of votes within the meaning of the relevant statute. *Id.*[9] The Court considered the legislative history of the statute, noting, among other things, that the vote on such a proposition was required to be held at a general election, *id.* at 583, and that the relevant statutory language required a majority of votes "at the election."

Thurston found that, at least where a measure is required to be submitted at a general election, "the great weight of authority . . . supports the view that in order to pass such a measure it must have the actual affirmative vote of a majority or the required proportion of those who participate in the election." *Id.* at 584. *Thurston* canvassed a host of other state court decisions which either explicitly or implicitly confirmed this view and distinguished the minority which did not. *Id.* at 585 et seq. The *Thurston* Court recognized the significance of the statutory language, which, like the statute in this case, required a majority of votes cast "at the election" to pass the measure, construing such words themselves to mean

[9] "The record presents a single question of law: Does the statute require the proposition to receive a majority of all votes cast at the election or a majority of all votes cast on the proposition, even though that majority be a minority of all votes cast?" *Id.* at 576-577.

a majority of all those voting *at the election* as opposed to a majority of those voting *on the measure*. *Id.* at 585-586. For these reasons and others, the Court determined that the appropriation measure had not passed. *Id.* at 601.

The weight of other state authority noted by the district court is to the same effect. See, e.g., *Allen v. Burkhart*, 377 P.2d 821 (Okla. 1962) (in order to be approved, initiated measure, submitted to the people by operation of law at the general election, must receive an affirmative vote by a majority of voters casting their vote in such general election); *cf. Stembridge v. Newton*, 213 Ga. 304 (Ga. 1957) (decisional law holding that votes of all participants should be counted to determine majority inapplicable where disputed votes were cast at *special*, rather than *general*, election).

The district court placed particular emphasis on California case law, which, as already noted, is given particular deference in construing Guamanian law. *See Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979), and cases cited therein. Thus, as the district court observed (Pet. App. A-48), *People ex rel. Wells v. Town of Berkeley*, 102 Cal. 298, 307 (Cal. 1894) held that the term, "majority of electors voting at a general election" was to be taken literally, and that all voters' votes were to be counted in determining a majority. *Santa Rosa v. Bower*, 142 Cal. 299 (Cal. 1904) proclaimed an even broader statement of the rule. There the California Supreme Court considered a charter vote which was to be "submitted to the qualified voters of said city at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature . . . ". *Id.* at 300. The charter having been submitted

to the electorate at a general election, *Bower* held that, under these circumstances, the word "thereat" referred to the general election actually held, so that a majority of *all* votes cast in that election, not just those cast on the charter, was required.[10]

Finally, as petitioners themselves observe, "Congress is deemed to have followed relevant judicial statutory interpretations rendered before a statute was passed, unless the statute makes clear that a different interpretation is intended." (Gutierrez Merits Brief, at 21, citing

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[10] Similarly, *People ex rel. Smith v. City of Woodlake*, 41 Cal. App.2d 119 (1940), involved an election on the incorporation of a municipality. 171 votes were cast in favor of incorporation, 163 against, and 9 expressed no choice on incorporation but cast votes on the other matters presented on the same ballot, for a total of 343. The Court observed that, "it is the general rule that when a proposition is required to carry by a majority of votes cast at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the vote on a particular question." *Id.* at 122-123. On this basis the Court held that the proposition had been defeated for failure to garner more than half of the 343 votes cast. *Id.* at 125. The Court also observed that "if the legislature had intended that the total votes cast at the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. *Id.*; see also *People ex rel. Rowe v. West Side County Water District*, 112 Cal.App.2d 228 (1952) (declining to conclude that measure passed where, of 490 votes, 242 were in favor, 241 were against, and seven were abstentions, because all 490 votes were to be considered as votes cast, and noting that "if the legislature had intended to authorize [the proposition] upon a favorable majority of the votes on the proposition rather than upon a favorable majority of the votes cast at the election it would have been a very simple matter to say so in concise terms.")

Morissette v. United States, 342 U.S. 246 [1952]). As the district court recognized (Pet. App. A-50), however, this principle undermines petitioners' claim. *Cass*, *Thurston*, and the California cases reflect the prevailing judicial view in 1968: in any race conducted at a general election, the total number of votes cast in that general election is the number to be used in computing the requisite majority as to any particular issue or office.

C. *Todman v. Boschulte*, Relied Upon By Petitioners, Is Poorly Reasoned And Should Not Be Followed, While *Euwema v. Todman*, Relied Upon By *Boschulte*, Actually Supports Ada's Position

Gutierrez urges this Court to adopt the holding of *Todman v. Boschulte*, 694 F.2d 939 (3rd Cir. 1982). *Boschulte* interpreted statutory language like that contained in 48 U.S.C. § 1422 and concluded that, under the Virgin Islands Organic Act, voters who submitted ballots blank as to gubernatorial race candidates were to be ignored for purposes of calculating whether a given gubernatorial candidate had garnered a majority of the total votes.

The district court and Ninth Circuit correctly rejected *Boschulte* as neither binding nor persuasive. As they correctly discerned, *Boschulte* is of no value because the most cursory examination reveals that it contains no legal discussion beyond a citation to a single case, the holding of which it flatly misreads. That opinion, *Euwema v. Todman*, 323 F.Supp.167 (D.V.I. 1971), was decided 11 years before *Boschulte*, and in fact supports the general proposition

recognized in *Cass* and applied by the district court below.

In *Euwema*, pursuant to Congressional mandate, a special election was held in the Virgin Islands on a referendum to lower the voting age. Some 13,000 votes were cast in the referendum on the voting age issue; of these 13,000 votes, over 7,000 were in favor of lowering the voting age to eighteen. *Id.*, at 169-170. The 7000-plus vote to confer the franchise on eighteen year olds was challenged as inadequate on the ground that there were 19,756 qualified voters in the Virgin Islands.

The district court began the *Euwema* opinion by stating that, "[t]he question presented here is not . . . whether a blank ballot should be tallied as an affirmative or negative vote on a given proposition." *Id.* at 168 (emphasis added). The issue, instead, was, "(W)hether, under the (Virgin Islands' statute), the voting age question submitted to the electorate is to be deemed part and parcel of the general elections held on November 3, 1970, or a separate and special election held on the same date." *Id.* The question whether the referendum was a general or special election was critical because of the established rule governing general elections:

> Despite one or two holdings to the contrary, it is settled law that a "proposition must receive the majority or other required proportion of all the votes cast at the election, where the Constitution or Statute requires ratification by a majority of the electors of the State or provides for ratification 'whenever a majority of the electors voting

> at a general election shall so determine' or, generally where the requirement is that the proposition submitted at a general election must receive in its favor a majority or other proportion of the votes of the electors voting at such election, or a majority or other proportion of all the votes cast at the election. *In other words, the proposition is not carried by a majority of the votes cast therefore unless such majority is also a majority of all votes cast at the election."*

Id. at 170. (Emphasis added)

On the other hand, *Euwema* found that in a special election on a proposition, only votes cast on a specific measure are counted towards a majority. Finding that the voting age referendum was a special election, the district court rejected the challenge, holding that the 7,000 vote total was "a clear majority of the 13,416 voters [who] participated in the election." *Euwema*, 323 F.Supp. at 171. The district court here correctly distilled the meaning of *Euwema* for present purposes:

> The Virgin Islands District court in that case did *not* hold that blank ballots should not be counted. It held that it would only count those ballots cast by the voters participating in the so-called special election. *But Euwema means, by implication, that if the question had been a part of the general election, all votes would have to be used to calculate the majority, not just the votes cast on the proposition at issue.*

(Pet. App. at A-46) (Emphasis added).

In this case, of course, the statute requires that the gubernatorial election be conducted as part and parcel of

the *general* election in Guam.[11] Because the rule pertaining to general elections requires that the number of total votes be computed by counting all persons who voted at the general election, and not merely those who stated a preference for one gubernatorial slate over another, the district court's determination, affirmed by the Ninth Circuit, that Gutierrez failed to garner a majority of total votes cast *at the election* must be upheld.

III. GUAM'S LOCAL ELECTION STATUTES HAVE NO BEARING ON THE MAJORITY REQUIREMENT SET FORTH IN 48 U.S.C. SECTION 1422

Gutierrez also makes much of two Guam election statutes (3 Guam Code Annotated §§ 11111 and 11114) which limit the validity of election ballots not adhering to certain formal requirements. *See* Gutierrez Merits Brief at 4-5, 23-24. These statutes, however, only establish that such irregular ballots are not counted in favor of any candidate for the office as to which they are invalid. They do not purport to preclude such ballots from being counted as "votes cast" under 48 U.S.C. § 1422. Indeed, as the Court of Appeals correctly noted, § 11114 "expressly provides that these ballots are still valid for purposes of other races in the election." *Ada v. Gov't of Guam*, 179 F.3d at 682. In addition, Guam's election statutes, being subordinate to 48 U.S.C. § 1422's clear mandate under the Supremacy Clause, must be interpreted in conformity with § 1422. *See* U.S. Const. art. VI, cl. 2; *see also Ada v.*

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[11] " . . . [B]eginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election . . . ". 48 U.S.C. § 1422.

Gov't of Guam, 179 F.3d at 682 (citing *Euwema v. Todman*, 323 F. Supp. at 170); *Guam Fresh v. Governor of Guam*, 849 F.2d 436 (9th Cir. 1988) (test for federal preemption of territorial laws under Supremacy Clause is same as the test for preemption of state law).

Gutierrez invokes *Ramsey v. Chaco*, 549 F.2d 1335 (9th Cir. 1977) for the proposition that the Guam statutes are "deemed to have Congressional approval" because they were enacted prior to 1968 and not annulled by Congress thereafter. See Gutierrez Merits Brief at 27-28. Even if that were true and both the Guam statutes could be considered federal in nature, section 1422, being a later law speaking to the same topic, trumps the earlier.[12]

IV. THE DISTRICT COURT'S INTERPRETATION OF 48 U.S.C. SECTION 1422 FULFILLS THE POLICY OBJECTIVES UNDERLYING THE STATUTE BECAUSE IT ENSURES THE LEGITIMACY OF THE ELECTION RESULT

Finally, Gutierrez argues that, "when there are only two slates in a gubernatorial election, it is senseless to

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[12] Ada also notes that Gutierrez relies on *Ramsey* and the Guam election statutes to argue that *both* overvotes and undervotes should have been disregarded in calculating the gubernatorial majority. To the extent it challenges the counting of overvotes, however, the claim was never raised before the district court and was relegated to footnotes in petitioners' brief to the Court of Appeals. See Petitioners' Opening Brief on Appeal at n. 1 and 2. The challenge to the counting of overvotes should, accordingly, be disregarded. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("As the Seventh Circuit . . . stated aptly: '[j]udges are not like pigs, hunting for truffles buried in briefs.' ")

require a 'runoff election' between the two slates 'receiving the highest and second highest number of votes cast.' " (Gutierrez Merits Brief, at 28). Such a result is by no means "senseless," and there are any number of circumstances in which § 1422 would plainly require it.

Suppose that, as here, there are two gubernatorial slates in contention at the general election and, as here, 48,666 votes are cast. One slate receives 24,308 votes, twenty-six short of a majority; the other receives 23,258, seventy-six short of a majority; and a person not appearing on the ballot receives one hundred write-in votes. There can be no question that under section 1422, a runoff would be required despite the fact that "there were only two slates in the gubernatorial election" and despite the minuscule number of write-in votes.

Nor would such a runoff be a meaningless exercise. When voters are confronted with a choice between two candidates rather than among a universe of candidates, they may well prefer the candidate who did not receive a plurality in the prior election. *See*, e.g., *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821 (N.D.Ga. 1993), *affirmed*, 992 F.2d 1548 (11th Cir. 1993) (Court upholds result of election for office of U.S. senator where incumbent who had received 49.22% of votes to opponent's 47.66% in general election lost runoff to opponent.)[13]

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[13] The brief of amicus largely attacks the Ninth Circuit's ruling by raising the specter of never-ending gubernatorial elections. It does so by suggesting that the majority requirements imposed by 48 U.S.C. § 1422 for election of governor at a general election would apply whenever a run-off election is required "between the candidates for Governor and

Furthermore, the underlying purpose of section 1422 is to confer on the prevailing party the greater *legitimacy* inherent in having received more than 50% of the votes of all those who went to the polls and participated in the election, a point which the district court distinctly recognized. Noting that inclusion of all votes cast at the election would leave Gutierrez without a majority but very close to it, the court expressed "no joy" in ordering a runoff, but asked,

> . . . is this Court to simply ignore the law? To say it was close enough, why worry about the few extra votes is unacceptable. The law does not authorize a casual approach. The Organic Act requires a majority.

(Pet. App. A-53). As the court then observed,

> . . . The requirement of a majority is important in precisely this situation, where the election is very close, when the results are otherwise

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Lieutenant Governor receiving the highest and second highest number of votes cast." This is simply untrue. A run-off which is expressly limited to two candidates is won by determining which of those two candidates receives the higher number of votes. *Public Citizen, Inc. v. Miller*, 821 F.Supp. at 832-833 ("As for the runoff election, the requirement that a candidate receive a majority of the vote is merely a restatement of the truism that in a race between two people, the person who receives the most votes wins"); *Cunningham v. Queen, et al.*, 96 S.W.2d 798 (Tex.Civ.App. 1936) (Rejecting claim that write-ins should be permitted at runoff election held pursuant to state statute limiting ballot choices at such election to two candidates, and observing that, " . . . the whole purpose of the runoff [election] is to have an elimination between the two candidates having the highest number of votes, but not a majority, in the first [election]").

> extremely unreliable. (Note omitted) The requirement of a majority is a built-in safeguard against petty fraud in a close election, where a small amount of fraud can make an enormous difference. In that case the exact calculation of a majority is all the more important.

(Pet. App. A-53-54).

This analysis duly recognizes § 1422's patent concern that any gubernatorial election result be viewed as legitimate and squarely refutes Gutierrez's suggestion that in a two-party race, merely approaching a majority should be equated with attaining it.

When all is said and done, Gutierrez provides no meaningful response to the question why, if Congress intended the term "votes cast" to mean something other than the total votes cast at the general election, it did not simply say so. The answer is that, given section 1422's plain language and related decisional authority, Congress intended that a gubernatorial candidate would be required to garner a majority of all votes cast at the election in order to prevail.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Dated: November 18, 1999

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In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTRODUCTION

Respondents define the issue as whether the act of leaving a ballot blank constitutes a "vote cast." They argue that it does, because it amounts to a choice of "nobody for Governor" and constitutes an "act of expressing dissatisfaction with the choices offered." (Respondents' Brief 6.) But there is no authority for this remarkable proposition in the statute governing Guam gubernatorial elections, 48 U.S.C. § 1422; there is no evidence in the legislature history that Congress intended "votes cast" to include those who – for whatever reason – choose not to express a choice for Governor; and it is contradicted by the applicable Guam election laws regarding the counting of votes, which have been approved by Congress. Moreover, it is contrary to this Court's longstanding election law principle that those who do not express a preference are presumed to assent to the expressed will of the majority of those voting. *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877).

Indeed, any other system would be unworkable. As respondents concede, a "vote" means expressing a choice. (Respondents' Brief at 8, note 2.) *See also Burdick v. Takushi*, 504 U.S. 428, 438, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (rejecting argument that voter had constitutional right to write-in vote for Donald Duck; the function of election process is selection of candidate for office, not a more generalized expressive function). Under respondents' scenario, those who returned ballots on which the gubernatorial race were left blank would have to be canvassed to determine whether the blank ballot meant that they had no interest in voting in that race, overlooked

that part of the ballot, or were undertaking the "act of expressing dissatisfaction with the choices offered"; and the latter category would be included with the "votes cast," while the first two categories not. Surely if Congress had intended such a system, it would have made this clear in the statute.

Respondents' convoluted arguments notwithstanding, this is a simple case. The statute is not ambiguous. It requires a determination of the "votes cast," and the statute even tells how a vote is cast: "*by the casting* by each voter *of a single vote applicable to both offices* [Governor and Lieutenant Governor]." Moreover, Congressional interpretation is consistent with the obvious meaning of the statute. The "majority of the votes cast," with the procedure being the "casting by each voter of a single vote applicable to both offices," can only mean the consideration of *votes that are so cast* in the gubernatorial election.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE AND CONGRESSIONAL STATEMENTS CONFIRM THAT ONLY *VOTES CAST* IN THE GOVERNOR'S ELECTION ARE TO BE COUNTED

Respondents ask this Court to equate blank ballots with write-in votes, arguing that both are political "acts." (Respondents' Brief 5-6.) Respondents also argue that ballots left blank as to the gubernatorial race should be counted as "votes cast" in the gubernatorial race if votes are cast on those ballots for other races in the general

election. (Respondents' Brief 7-9.)[1] But respondents also concede that "the starting point . . . is the language [of the statute] itself." (Respondents' Brief 6 (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978)). By any plain meaning test, a vote is not cast by leaving the ballot blank.[2] And specifically, as required by the statute, a vote is not cast "by the casting by each voter of a single vote applicable to both offices [Governor and Lieutenant Governor]" by *not* casting a single vote applicable to both of those offices, but voting, at the general election, in the races for the U.S. Delegate, the school board, or whatever other office might be up for election that day. The statute does not say that a vote is "cast" by simply returning a ballot, or by returning a ballot that contains no vote for Governor. There is no evidence whatsoever – either in the express terms of the statute or in its legislative history – to suggest that Congress intended that, in counting "votes cast" for the Governor and Lieutenant Governor, the "votes cast" *not* for Governor and Lieutenant Governor but instead in some other race should be considered.

This obvious proposition is confirmed by the statements of the House of Representatives in its consideration of the Blaz Contest. The issue there was the same as

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[1] It should be noted that the record does not even reveal whether the 1,313 ballots that were blank as to the gubernatorial contest contained votes as to other contests on the ballot or were blank as to them as well.

[2] *See, e.g.*, Black's Law Dictionary 1571 (7th ed. 1999) ("vote" defined as "the expression of one's preference or opinion by ballot, show of hands, or other type of communication"). "Vote" and "ballot" are simply not fungible.

that here: whether blank ballots should be considered in determining whether a candidate had obtained a majority of the "votes cast." The House answered: no. Although the federal statute providing for the election of Guam's non-voting Delegate to the House is not identical to Section 1422, the *House* stated that the statute being considered there was similar to the federal statutory language governing the election of Governors and non-voting Delegates from each of the Territories. And the House found that *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), was dispositive since it dealt with the "identical issue": "a voter who does not mark his ballot is presumed to assent to the choice of those who do."[3] Thus, the House of Represe.tatives has provided clear guidance of its understanding regarding the meaning of "votes cast" in the statute.

Respondents' attempts to justify the Court of Appeals' rewriting of the statute can only be characterized as verbal gymnastics. Respondents take the term "any election" out of context and attribute to it the definition of "votes cast," arguing that the "votes cast" provided for in Section 1422 – which statute deals exclusively with Guam's *gubernatorial* race – means votes cast for any office at the general election held that day. (Respondents' Brief 7-10.) The word "any" simply cannot carry this much baggage, particularly when it is referring to an "election," which is not an event but rather a contest or race. *See Foster v. Love*, 522 U.S. 67, 71, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997) ("election" refers to "the

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[3] *Dismissing the Election Contest Against Ben Blaz*, H.R. Rep. No. 220, 99th Cong., 1st Sess. (1985), at 4.

combined actions of voters and officials meant to make a final selection of an officeholder"; citing definition of "election" as " '[t]he act of choosing a person to fill an office' "); *United States v. Classic*, 313 U.S. 299, 318, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) ("election" is "the expression by qualified electors of their choice of candidates").

Moreover, notably, respondents do not argue that "any election" actually means *any* election. According to respondents, it does not mean any *gubernatorial election* (which, of course, is the only subject of Section 1422), but instead means the general election. However, it does not mean just *any* general election, but only the particular general election of which the gubernatorial election is a part. So respondents, while arguing that "any" is the operative word, actually try to read "any" out of the statute.

In the final analysis, the phrase "in any election" is not, as the Court of Appeals stated, a "nullity" if it refers to the gubernatorial election. When read in context – as it must be – it is clear that "in any election" refers to the various gubernatorial elections that are the very subject of Section 1422 – that is, the first one to be held on November 3, 1970 and each of the succeeding ones, to be held every four years, "*at* the general election" (emphasis added).[4]

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[4] The only other sentence of Section 1422 that respondents argue is meaningful for this analysis is: "The Governor of Guam . . . shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam." (Respondents' Brief 7.) It is hard to see the relevance of this sentence to the issue presented, however,

Respondents also argue that Congress should have added language to Section 1422 stating explicitly that it was referring to the *gubernatorial* election, and to the election for the office of *Governor*. (Respondents' Brief 10-13.)[5] But only as a result of the highly contorted position argued by respondents (and adopted by the Court of Appeals) would such additional language become necessary. The sole subject of Section 1422 is Guam's gubernatorial office and the election of Guam's Governor and Lieutenant Governor; no other offices – or elections – are addressed. Respondents' reading of the statute is contrary to common sense and logic, and does violence to the obvious and simple language and purpose of the statute, which is to provide for election of Guam's Governor.

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since the statute explicitly requires a winner to obtain "a majority of the votes cast." Respondents do not argue that the winner must obtain a majority of the *eligible voters*, whether or not they vote in the election. Instead, they simply try to argue that "ballots returned" means "votes cast" – a proposition not found anywhere in the statute.

[5] For example, respondents point to the statute providing for recall of a governor, which requires a two-thirds vote of the number of persons who had voted for the office of governor in the last election. 48 U.S.C. § 1422a. But such a specific definition is unnecessary in the statute dealing with *election* of the governor, because that very election is the subject of the statute itself; there is no need to define the number to win by referring to those voting at a different election. Indeed, if anything, Section 1422a shows that Congress intended to tie the number of votes required for a recall of the governor to the number of persons actually voting for governor. This cannot be reconciled with respondents' position that *election* of the governor is to be determined based on a consideration of ballots on which the person did not even cast a vote for that office.

II. *JOHNSTON* PROVIDES THE ANSWER IN THIS CASE: THOSE WHO DO NOT CAST A VOTE ARE NOT COUNTED

This Court has said that not voting cannot constitute the casting of a vote. "All qualified voters who absent themselves from an election duly called are presumed to assent to *the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares." *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877) (emphasis added). Thus, *Johnston* requires that non-voters not be counted, *unless* the statute expressly states otherwise. And Section 1422 does not expressly state otherwise. Respondents' attempt to distinguish *Johnston*, by discussing *State v. Winkelmeier*, 35 Mo. 103 (1864), is unavailing.[6]

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[6] In *Johnston*, the Court was considering whether a Missouri state statute conflicted with the Missouri Constitution. The statute allowed a township to subscribe to railroad company stock if "two-thirds of the qualified voters of the township, voting at an election called for that purpose, shall vote in favor of the subscription." The State Constitution allowed such a subscription only if "two-thirds of the qualified voters of the town, at a regular or special election to be held therein, shall assent thereto." 95 U.S. at 365. The Court interpreted the question to be whether the measure need receive the vote of two-thirds of those voting at the special election on the measure, or the vote of two-thirds of all of the town's qualified voters. The Court held that it was two-thirds of those voting on the measure.

In reaching this conclusion, the Court noted a number of Missouri state cases. One of the cases mentioned was *State v. Winkelmeier*, 35 Mo. 103 (1864) (which had been decided before the adoption of the Missouri State Constitution). There, the applicable statute expressly required a measure to be adopted

But this Court need not consult Missouri state law from the last century. As confirmed by the House in the Blaz Contest (by relying on *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982)), the holding in *Johnston* is broad enough to apply to voters who appear at the election and receive a ballot, but do not vote in a particular election. In both cases, "a voter who does not mark his ballot is presumed to assent to the choice of those who do." The *Johnston* principle cannot be successfully confined, as respondents contend, to voters who do not go to the polls at all. Like persons who stay home, persons who do not cast a vote in the gubernatorial race have not expressed their will in that contest and are properly presumed to assent to the expressed will of those who voted in the race.

In *Todman*, the Third Circuit decided the same issue presented here. In interpreting language in the Virgin Islands Elective Governor Act (48 U.S.C. § 1591) which is identical to the language in the Guam Elective Governor Act (48 U.S.C. § 1422), the Court had to address the issue of ballots left blank as to the governor's race, and

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by "a majority of the legal voters; that is, of all the legal voters of the city, and not merely of all those who might at a particular time choose to vote upon the question." 35 Mo. at 104. The Missouri court found that only 5,000 of those voting at the election – out of 13,000 – had voted in favor of it, and therefore that it had not obtained a majority. The Supreme Court in *Johnston* mentioned *Winkelmeier*, as well as a number of other Missouri cases, in the context of its consideration of whether the Missouri courts, as a practical matter, strictly enforced provisions requiring a majority of all the *qualified voters in the town*, or just those actually voting, and determined that the latter was the rule followed by the Missouri courts.

whether they should be counted in determining whether the candidate had received a majority of the "votes cast" within the meaning of the statute. The Third Circuit held that these ballots left blank as to the governor's race were not "votes cast": " 'voters . . . *not voting on the matter submitted* are presumed to assent to the expressed will of those attending and voting and *are not to be taken into consideration in determining the result.*' " 694 F.2d at 941 (emphasis added).

Todman is based on the principle enunciated by this Court in *Johnston*, and the common sense reading of the statute. Nevertheless, respondents argue that *Todman* is not persuasive because the Third Circuit there "noted" language from a Virgin Islands district court case, *Euwema v. Todman*, 323 F. Supp. 167 (D.V.I. 1971), the "holding" of which respondents claim the Third Circuit "misreads." (Respondents' Brief 20.) (The *Todman* court did not misread *Euwema* at all; it did not even characterize the holding.) However, *Euwema* did not deal with the issue presented here; and the fact that the Third Circuit "noted" some language from that case – which was relevant to the Third Circuit's opinion in *Todman* – does not impair the value of *Todman*, which is based on the plain reading of the statute in light of the principles enunciated in *Johnston*.

The language the Third Circuit quoted from *Euwema* came right out of *Johnston*.[7] Furthermore, *Euwema* is not inconsistent with *Todman* and *Johnston*. In *Euwema*, the

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[7] The *Euwema* court quoted from Am. Jur. 2d, "Elections," § 310, p. 135 (1966 ed.). 323 F. Supp. at 171. That section of Am. Jr. 2d is based on and cites to *Johnston*.

Virgin Islands district court held that a particular measure that was voted on at the general election, and did not receive a majority of the votes of those persons voting at the general election, nevertheless had passed because it had received *a majority of the votes of those who actually voted on the particular measure*. The court did not consider the number of all the "qualified voters" (even though that was actually what the relevant election statute required) nor did it even consider the total number of voters voting at the general election at which the measure was voted on, in determining whether the measure had passed by a majority. Only the number of voters who actually voted on the particular question was considered, in determining whether the measure had received a majority. "To hold otherwise," said the *Euwema* court, "would be to permit an indifferent minority to prevent a determination of issues and thus impede or totally obstruct vital governmental processes and interests." 323 F. Supp. at 171.

So, too, here. No choice in a gubernatorial election is expressed by persons who cast no vote in that race, even if such persons cast a vote for a different elective office on the same ballot. Those persons are in the same situation as to the gubernatorial race as the voter who stayed home on election day. It would be an intolerable result if an "indifferent minority" – those who voted on other races at the general election but chose not to vote in the gubernatorial race – could require a second election. Clearly, this is not what the statute requires.

III. THE RELEVANCE OF STATE AND TERRITORIAL LAW

Respondents argue that the laws of various states (Nebraska, Oklahoma and Georgia) should be consulted to interpret 48 U.S.C. § 1422. (Respondents' Brief 17-18.) They also argue that California law, in particular, should be considered. (Respondents' Brief 18-20.) Their position is unsound.

The California state law decisions relied on by respondents to support their interpretation of 48 U.S.C. § 1422 are neither relevant nor apposite. First, while the courts give deference to California law in interpreting *Guam statutes* (to the extent that the Guam Code is based on particular California statutes),[8] Section 1422 is a federal statute. Federal courts do not look to California law in interpreting a federal statute. *Johnston*, instead, is applicable.

Second, California law does not contradict or undermine *Johnston*. To the contrary, the California Supreme Court, in *Law v. City and County of San Francisco*, 144 Cal. 384, 77 P. 1014 (1904), echoed the principle of following the expressed will of the majority: "Universally courts have been reluctant to defeat the fair expression of the popular will in elections, *unless the plain mandate of the law permitted of no alternative.*" 144 Cal. at 394 (emphasis added).

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[8] *See, e.g., People of the Territory of Guam v. Borja*, 732 F.2d 733, 735 (9th Cir. 1984); *Smith v. Lujan*, 588 F.2d 1304, 1306 (9th Cir. 1979); *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975).

In any event, the California cases relied on by respondents are inapposite. Each turned on the specific language of the provision at issue, and, in some cases, its legislative history.[9] In the California cases cited by respondents, the language being construed was "thereat" or "voting at." *See City of Santa Rosa v. Bower*, 142 Cal. 299, 301-02, 75 P. 829 (1904) ("thereat"); *People v. Town of Berkeley*, 102 Cal. 298, 303, 36 P. 591 (1894) ("voting at"); *People v. West Side County Water District*, 112 Cal.App.2d 228, 230-31, 246 P.2d 119 (1952) ("votes cast at"); *People ex rel. Smith v. City of Woodlake*, 41 Cal.App.2d 119, 120, 106 P.2d 71 (1940) ("thereat"). These terms do not appear in 48 U.S.C. § 1422.

These California cases contain no relevant overarching principles of statutory construction; they merely address the language of particular California state statutes, constitutional provisions, or city charters, often in the context of the legislative history of, or elucidating amendments to, those provisions. Moreover, the California cases pertained to completely different types of events than the Guam gubernatorial race. None involved an election of an individual to political office or a runoff election. Each referred to a referendum in which a bond measure, proposition or similar issue was either approved or rejected. *See, e.g., City of Santa Rosa v. Bower*, 142 Cal. at 300 (ratification of city charter); *People v. Town*

[9] For example, in *City of Santa Rosa v. Bower*, 142 Cal. 299, 75 P. 829 (1904), the amendment of the constitutional provision at issue, from "electors voting thereat" to "electors voting *thereon*," was held to elucidate the meaning of the provision ("thereat" meaning votes cast at the election, and "thereon" meaning votes cast *upon* the particular proposition at issue). 142 Cal. at 301-02.

of Berkeley, 102 Cal. at 304 (proposition for reorganization); *People v. West Side County Water District*, 112 Cal.App.2d at 229 (formation of water district); *People ex rel. Smith v. City of Woodlake*, 41 Cal.App.2d at 119 (incorporation of city).

The policy considerations underlying rules for when to conduct a runoff election differ dramatically from those involved in statutes relating to the requirements of passing such referenda. In no event would the time or expense of a runoff election be required in these referenda. Thus, counting ballots in which no vote was cast on the proposition at issue (but a vote was cast on a different proposition) merely raises the bar a notch for approval of the measure – if ballots on which no vote was cast with respect to the specific proposition are counted in determining whether a majority approved the proposition, it necessarily will be harder to pass the measure. As a matter of policy, one could choose to make it more difficult to pass certain types of propositions. No analogous policy would be served by requiring the counting of blank ballots on which the voter expressed no choice for Governor. Because the policy concerns underpinning referenda and elections of government officials are so different, the California courts' decisions on referenda have no bearing on the proper interpretation of 48 U.S.C. § 1422.

With respect to respondents' reliance on state law cases out of Nebraska, Oklahoma, and Georgia, those cases also do not address the language of the federal statute at issue here. *See Thurston County Farm Bureau v. Thurston County*, 136 Neb. 575, 287 N.W. 180 (1939) (court determined legislative intent based on change in the statute by which legislature had intentionally omitted the

term "voting on the question" in order to require counting of " 'all votes cast' " at the election); *Allen v. Burkhart*, 377 P.2d 821 (Okla. 1962) (held that (i) the governor could not call a special election on an initiative to amend the Oklahoma Constitution on the same day as the general election, and (ii) Oklahoma law required that amendments to the Oklahoma Constitution be adopted by an affirmative vote of more electors than a simple majority of those who cast a ballot upon the proposed amendment); *Stembridge v. Newton*, 213 Ga. 304, 99 S.E.2d 133 (1957) (statute provided "if a majority of those persons voting in such election vote for approval of the act, then it shall become of full force and effect"; held that only votes in favor of or opposed to act would be considered, and indecipherable ballots are "a nullity" and would be excluded (and not considered "votes cast") in determining whether act had been approved by a majority).

In fact, if this Court were to canvass case law from all the states, it would find that most of the cases are consistent with petitioners' position here – that a measure need receive only a majority of those actually voting on the measure. *See, e.g., Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985) (blank ballots would not be deemed ballots voted, for purposes of determining whether or not there was majority in favor of measure: " 'The general view is that a qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.' "); *Wooley v. Sterrett*, 387 S.W.2d 734 (Tex. 1965) (despite statutory requirement that proposition receive "a

majority of such voters, voting *at* such election," held that blank ballots would not be considered in determining whether proposition had passed by a majority; even under the specific statutory language, as a matter of law the proposition must obtain only "the majority of votes 'legally' cast and reflecting the free exercise of choice by the voters"; the word "vote" means affirmative act of choice and cannot be equated with failure of choice); *Chapel v. School District No. 8*, 334 Mich. 176, 54 N.W.2d 209 (1952) (despite statutory language requiring measure to pass by "a majority of the school electors," only a majority of those actually voting would be required; " 'it is contrary to our system of government to count electors on a question who are not sufficiently interested to vote' "; " 'voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result.' "); *Munce v. O'Hara*, 340 Pa. 209, 16 A.2d 532 (1940) (despite statutory language that proposition must receive "a majority vote of [the county's] qualified electors cast at any general election," only a majority of the votes cast on the particular proposition was required, in keeping with "the great weight of authority"; " 'those who come to an election and cast a blank ballot in principle are no more efficacious in expressing their convictions than those who absent themselves altogether' "); *State of Washington v. Clausen*, 72 Wash. 409, 130 P. 479 (1913) (despite statutory language requiring approval of proposition "by three-fifths of the qualified voters of the said city or town voting at said election," illegal or rejected ballots would not be considered; "only those ballots that

express the voter's choice with such clearness that the ballot can be counted either for or against the submitted proposition, can be counted in the totals").

Nevertheless, it is submitted that if *any* non-federal law is to be consulted, it ought to be the election laws of Guam, which expressly address the issue and direct that ballots left blank as to a particular race are not to be counted for purposes of that race. As provided in the Guam Election Code, *"if for any reason it is impossible to determine [a voter's] choice for any office, his ballot shall not be counted for that office."* 3 Guam Code Ann. § 11114 (emphasis added). *See also* 3 Guam Code Ann. § 11111 ("At any election, any ballot which is not marked as provided by law shall be void . . . ").[10]

When Congress passed 48 U.S.C. § 1422, it was with knowledge and approval of the Guam election statutes providing that ballots blank as to a particular race are not counted with regard to that race. *See Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir. 1977). Therefore, if it is advisable to supplement *Johnston*, Guam election law can adequately do so. It is certainly more germane than Nebraska, Oklahoma, Georgia, or California state law

[10] Respondents misstate these statutes as providing that irregular ballots "are not counted *in favor of* any candidate for the office as to which they are invalid," and argue that therefore they do provide for counting these ballots as "votes cast" for determining whether a majority has been obtained in that race. (Respondents' Brief 23 (emphasis added).) The statutes say no such thing, and, in fact, state that the entire *ballot* shall not be counted for that race.

cases construing statutes with different language, history and purpose.[11]

IV. SECTION 1422 DOES NOT REQUIRE A RUNOFF ELECTION WHEN ONE OF THE TWO SLATES OBTAINED A MAJORITY OF THE VOTES CAST BY THOSE WHO CHOSE TO VOTE

Section 1422 provides that the Governor and Lieutenant Governor of Guam shall be elected "by the casting by each voter of a single vote applicable to both offices." The majority of the votes cast shall determine the winner. In the November 3, 1998 election, the Gutierrez slate got the majority of the votes validly cast as defined by statute. No purpose would be served by requiring a "runoff election" between the two slates "receiving the highest and second highest number of votes cast" when there

[11] In fact, a Guam Court has recently decided what it means to "vote" under Guam law. The Guam Superior Court has decided the case of *Ada v. Gutierrez*, raising the issues of this case in the Guam Court, and claiming voting fraud. The Guam Superior Court both found that Ada's claims of voting fraud in the November 3, 1998 election were without basis, and ruled regarding the applicability of the Guam statutes to these issues. Specifically, the Guam Superior Court held that blank ballots (as well as double-voted ballots and ballots on which the oval for write-in votes was filled in but no name was written in) should not be counted in determining whether a majority had been obtained. The Court also explained how several of the Guam statutes which regulate voting related to the determination of "votes cast" in the gubernatorial election; and decided the issue now before this Court, that is, that blank ballots should not be included in determining the majority under Section 1422. *Ada, et al. v. Gutierrez, et al.*, Case No. CV 2765-98 (Feb. 16, 1999) (Appellants' Additional Citations, filed Feb. 24, 1999), at 69-85.

were only two slates running, and one already obtained the majority of the votes cast.

Respondents try to rebut this argument by positing the situation of a close, two-slate race in which a *write-in candidate* garners enough votes to prevent either of the two slates from obtaining a majority. Respondents argue that, under this scenario, "[t]here can be no question that under section 1422, a runoff would be required." (Respondents' Brief 24-26.) This is true. But that is not the issue presented in this case. There is an enormous – and dispositive – difference between a vote for a write-in candidate for Governor and *not voting* for anyone for Governor; one is a "vote cast," the other is not.

Respondents also argue (without citation to any authority) that the purpose of Section 1422 is to confer legitimacy on the winner by requiring him to obtain more than 50% of the votes of "all those who *went to the polls and participated in the election*." (Respondents' Brief 26-27.) However, Section 1422 does not talk about either going to the polls or "participating in the election." It speaks only of "votes cast" – specifically, "by the casting by each voter of a single vote applicable to both offices."

There is no room in the statute for respondents' interpretation that those who chose *not to cast a vote* in the gubernatorial election should nevertheless be counted as having cast a vote. The argument is inconsistent with the plain meaning of the statute, the House of Representatives' interpretation of the statute, applicable federal law,

the majority of the state law cases, and the Guam Election Code.[12]

CONCLUSION

For all of the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and that portion of the judgment affirming the District Court of Guam's order directing

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[12] Respondents argue that, in a runoff election under Section 1422, a candidate need obtain only a plurality, not a majority of the votes cast. (Respondents' Brief 25, note 13.) The two cases cited by respondents do not support this proposition. In *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), the operative statute explicitly addressed the number of votes required to win a *runoff* for that office: *"the highest number of the votes cast in such run-off . . . election"* (emphasis added), as contrasted to the requirement of a *majority* in the initial election. 813 F. Supp. at 823, n.1. No such language appears in the statute at issue here, 48 U.S.C. § 1422. And the other case relied upon by respondents, *Cunningham v. Queen*, 96 S.W.2d 798 (Tex. Civ. App. 1936), holds contrary to respondents' argument. The court states that the purpose of a runoff is to have a contest between the two candidates receiving the highest number of votes, but not a majority, in the *initial* election; and goes on to state that the winner must obtain a *majority* in the *runoff* election, as well. 96 S.W.2d at 799-800.

runoff elections for Governor and Lieutenant Governor of Guam should be vacated.

Dated: November 26, 1999

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1999

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MADELEINE Z. BORDALLO,
Petitioners,

v.

JOSEPH F. ADA and
FELIX CAMACHO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE THE VOTING INTEGRITY PROJECT IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE THE VOTING INTEGRITY PROJECT IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Voting Integrity Project ("VIP") submits this amicus curiae brief with the consent of the parties.[1] VIP is

[1] Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amicus states that the brief in its entirety was drafted by amicus curiae and its counsel. No

a non-profit, non-partisan public interest organization headquartered in Arlington, Virginia. It is dedicated to preserving and protecting the fundamental right to vote and the integrity of American elections.

VIP's primary focus is on educating citizens to protect election integrity in their own communities, with a special emphasis on preventing election fraud. In appropriate cases, VIP will institute or participate in litigation to protect the fundament right to vote. VIP has participated as a party or an amicus in state and federal courts in numerous cases involving election laws and practices.[2]

SUMMARY OF ARGUMENT

In considering the proper interpretation of 48 U.S.C. § 1422, which governs the election of the governor and lieutenant governor of Guam, the Ninth Circuit should have followed the plain language of the statute in light of the statute's context. Blank ballots and improperly marked ballots should have been held to be void and irrelevant to the final vote count as required by Guam's election code. Instead, the Ninth Circuit flouted common sense and long-standing holdings of this Court by requiring a runoff election where none was needed.

When Congress required that winning candidates must receive a majority of "the votes cast in any election" to

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monetary contribution toward the preparation or submission of this brief was made by any person other than amicus curiae, its members, or its counsel.

[2] In filing this brief, VIP does not endorse the candidacy of the Petitioners' slate or express any unfavorable view with respect to the candidacy of the Respondents' slate. Nor does VIP take any position with respect to the merits of the election contest action of Respondents pending in the Guam territorial courts.

avoid a runoff, it was referring only to general gubernatorial elections. Congress did not mean to require a majority of *ballots* cast on Election Day in several different elections. If it had, it surely would have said so. Nothing in § 1422, however, refers to ballots. Yet the Ninth Circuit has admittedly rewritten the statute and substituted "ballots" for "votes." Similarly, nothing in § 1422 refers to any election other than the general gubernatorial election. The Ninth Circuit's ruling, however, allows the vote totals in the election for school board to throw a decisively resolved gubernatorial election into a runoff.

The Ninth Circuit's interpretation of § 1422 inevitably leads to absurd results. It allows even a small number of mismarked ballots to plunge Guam's political system into chaos. Not only would it require a runoff when it is nonsensical and antithetical to the will of the voters to do so, but it would make it possible for the runoff to fail to produce a winner. Not anticipating this distorted interpretation, Congress did not provide for a second runoff. Under the Ninth Circuit's decision, therefore, Guam could easily be left without a governor. That can not be what Congress intended.

The Ninth Circuit arrived at its flawed judgment because it ignored the definition of "election" that this Court established in *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464 (1997), and earlier cases. An election refers to the selection of an officeholder, not a series of choices for different offices. For example, a ballot asking voters to express their preferences for their presidential electors, senator, and representative calls for choices in three *different* elections held on the same day. When § 1422 employs the phrase "in any election" in a paragraph discussing *only* the gubernatorial election, the contest for

governor is the only election to which it is referring. Additionally, *Foster v. Love* mandates the conclusion that "votes cast" refers only to properly marked ballots. The casting of undervotes and overvotes are not actions "meant to make a final selection of an officeholder." Therefore they are not "votes cast" and need not be counted.

This Court resolved the issues at hand long ago when it decided *County of Cass v. Johnston*, 95 U.S. 360 (1877). In *Cass* the Court ruled that qualified voters who do not participate in an election assent to the will of those who do vote. Those who cast undervotes and overvotes in Guam did not "vote" as this Court has defined that term. They should not be counted in determining the number required for a majority. The Ninth Circuit's reasons for declining to apply *Cass* are not convincing.

Finally, the Ninth Circuit's reliance on 48 U.S.C. § 1712, which provides for the election of Guam's delegate to Congress, is misplaced. Section 1712 was enacted four years after § 1422. The fact that it expresses the same thing as § 1422 using clearer syntax does not alter the meaning of § 1422. Common sense, this Court's precedent, and earlier opinions of the Third and Ninth Circuits all teach that § 1422 should be assigned the meaning suggested by the context of its plain language, under which undervotes and overvotes are not counted and no runoff is necessary. A subsequently enacted statute having no bearing on gubernatorial elections cannot change that meaning.

For all these reasons, the Ninth Circuit's judgement should be reversed.

ARGUMENT

I. The Ninth Circuit Wrongly Interpreted the Language of 48 U.S.C. § 1422.

Section 1422 of Title 48 governs gubernatorial elections in Guam. It provides, in pertinent part:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. *If no candidates receive a majority of the votes cast in any election*, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. § 1422 (emphasis added). The plain language of the statute and its context dictates the disposition of this case. Petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") received a clear majority of the votes cast in Guam's gubernatorial election on November 8, 1998. Section 1422's runoff provision is not triggered by the results of the election.

The Ninth Circuit disagreed. In an opinion in which it essentially rewrote § 1422, the court required that a winning candidate receive a vote total equal to a majority

of all the ballots cast on election day, including partially blank ballots and improperly marked ballots. *See Ada v. Government of Guam*, 179 F.3d 672, 682 (9th Cir. 1999). Under that standard, Gutierrez failed to secure a majority, so the Ninth Circuit affirmed the district court's decision ordering a runoff. *See id.* at 683.

The Ninth Circuit misinterpreted § 1422. The statute, by plain language confirmed by its statutory context, requires only that a gubernatorial slate garner a majority of votes cast in *its* election, not in every election on the ballot.

A. *The Ninth Circuit Ignored the Statutory Context and Issued a Prescription for Absurd Results.*

The resolution of this controversy turns on the interpretation of § 1422's phrase "a majority of the votes cast in any election." The Ninth Circuit concluded that Congress intended the phrase to mean "the votes cast for *any* of the offices up for election at the general election; that is, the number of ballots cast." *Id.* at 677. The court admitted that "this interpretation equates 'votes cast' with 'ballots cast,'" but argued that rewriting the statute "in such a way as to avoid an absurdity is preferable to reading the phrase ['in any election'] out of the statute entirely." *Id.* at 677 n.5.

In so doing, the Ninth Circuit effectively struck the word "votes" out of the first paragraph of § 1422 and replaced it with the word "ballots" despite the fact that "ballots" appears nowhere in the paragraph while Congress employed "votes" five times. By making this substitution, the Ninth Circuit implied "a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it."

Fedorenko v. United States, 449 U.S. 490, 513, 101 S. Ct. 737, 750 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38, 55 S. Ct. 31, 36 (1934)).

The Ninth Circuit's interpretation of § 1422 also ignores the statutory context because it reads down-ballot elections into a paragraph dealing solely with gubernatorial elections. In its entirety, § 1422 sets out the procedure for electing Guam's governor and lieutenant governor, prescribes the length of their terms, enumerates their powers and responsibilities, and establishes the qualifications for the gubernatorial offices. Section 1422 does not mention any other office or election. Yet in the Ninth Circuit's view, § 1422 compels the Guam Election Commission to consider the voter turnout in races for congressional delegate, legislature, and school board in determining who should be certified the winner in the gubernatorial race. *See Ada*, 179 F.3d at 675. The Ninth Circuit is simply wrong.

The Ninth Circuit did not have to read the phrase "in any election" out of the statute to arrive at the correct result. It could simply have put the phrase in context. Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 119 S. Ct. 2090, 2102 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 1582 (1961)). The remainder of § 1422, the statutory context, makes clear that the phrase "in any election" merely means "any gubernatorial general election." This Court should rely on that context "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061 (1995) (internal quotations omitted).

The Ninth Circuit found "a good deal of appeal" to the contention "that it is nonsensical to require a runoff election when there were only two gubernatorial slates in the election and even more so because Gutierrez would have received a majority of votes validly cast even if all of the write-in votes had gone to Ada." *Ada*, 179 F.3d at 682. Because it judged its own interpretation of the statute so elegant, however, the court brushed aside that concern.[3] The court failed to appreciate, however, the full extent of the absurdity its interpretation of § 1422 compels. In the election at issue in this case, 609 voters (1.3%) voted for both Gutierrez and Ada, thereby casting ballots that are deemed void under Guam's election law. *See* 3 Guam Code Ann. § 11114 (providing that "if for any reason it is impossible to determine his choice of any office his ballot shall not be counted for that office.").

Projecting that same 1.3% rate of overvoting into the court-ordered runoff between Gutierrez and Ada, a situation could easily arise in which no winner could ever be declared. For example, if 10,000 voters turned out for the runoff election, 4,970 voted for Gutierrez, 4,900 voted for Ada, and 130 voters improperly checked both candidates, under the Ninth Circuit rule, no winner could be certified. A normal counting method would throw out the overvotes, allowing Gutierrez to garner 50.3% in the hypothetical runoff. If the overvotes are added to the

[3] In explaining why it broke from *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), which ascribed the plain meaning urged by the petitioners in this case to 48 U.S.C. § 1591, a statute prescribing gubernatorial elections in the U.S. Virgin Islands using language identical to that of § 1422, the Ninth Circuit noted: "We respectfully decline to follow *Todman*, however, because it does not provide a more persuasive interpretation of the relevant statutory language than that gleaned from our own textual analysis of § 1422." *Ada*, 179 F.3d at 679.

total, however, Gutierrez would be left with only 49.7%, just short of the required majority. The ridiculous result is that no one wins.

The probability of such a "failure to elect" in a gubernatorial runoff would be increased if the runoff ballot included a runoff election for delegate to Congress, as is contemplated by 48 U.S.C. § 1712 when no candidate for delegate attains a majority vote in the genereal election. In that circumstance, there would likely be voters who would choose to vote only in the delegate runoff. In Guam's 1998 general election, such voters – those who voted in down-ballot elections but not in the gubernatorial election – may have made up as much as 2.7% of the vote.[4] Under the Ninth Circuit holding, the ballot of those voters would also have to be counted for the purposes of determining whether a gubernatorial slate garnered a majority. In a runoff where undervotes and overvotes amount to four percent of the total ballots cast, the Ninth Circuit's holding makes it highly likely that no slate could garner a majority.

Because Congress never considered that its language in § 1422 could be read as the Ninth Circuit has read it, it did not provide for the possibility that no one would gather "a majority of the votes cast" in the runoff. There

[4] The record shows that 1,313 persons who voted in the general election neither voted for a gubernatorial slate nor cast a write-in vote. The record does not reflect how many of those persons cast entirely blank ballots and how many voted in down-ballot elections but not in the gubernatorial election. It can be inferred from the Ninth Circuit's opinion that under its rule, the former would not be counted but the latter would be. *See Ada*, 179 F.3d at 677 n.5 ("For example, a 'vote cast' in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate.").

is no provision for a *second* runoff. Guam would be left without a governor.

The Ninth Circuit's interpretation of the statute leads to absurd results not only in some unlikely fantasy but *in this very case*. If the voting patterns in the runoff follow those in the general election, no victor can ever be declared under the Ninth Circuit's ruling. Nor is the intractability of this situation caused by a uniquely close competition between Gutierrez and Ada.

The Guam race was relatively clear cut for an American election.[5] Gutierrez defeated Ada by 7.11%. In the United States, it is common for elections to be much closer than the race at hand. For example, in the 1996 presidential elections, less than two percent of the vote separated President Clinton and Senator Robert Dole in the races for electors in Georgia and Colorado, and less than one percent separated them in Kentucky and Nevada.[6] Similarly, the margins of victory were extremely small in the 1996 U.S. Senate elections in Georgia (1.32%) and Louisiana (0.34%). *See* FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 96 (1997).

Races for the U.S. House of Representatives can make the Guam gubernatorial race look like a rout. Gutierrez's margin of victory over Ada was 3,050 votes. *See Ada*, 179 F.3d at 675. In Washington's ninth congressional district, the margin of victory in 1996 was only 1,208, despite the fact that the total number of voters in that race

[5] Among the properly marked ballots, Gutierrez won 24,250 votes (53.47%), Ada won 21,200 votes (46.36%), and write-in candidates won 275 votes (0.60%). *See Ada*, 179 F.3d at 675.

[6] In Georgia, Dole beat Clinton by 1.17%. In Colorado, Dole beat Clinton by 1.37%. In Kentucky, Clinton beat Dole by 0.96%. In Nevada, Clinton beat Dole by 0.98%. *See* FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 96 (1997).

was more than double that in the Guam election. *See* FEDERAL ELECTION COMMISSION, *supra*. Runoff elections can be even closer. In the 1992 U.S. Senate runoff in Georgia, Paul Coverdell defeated Wyche Fowler by less than 20,000 votes out of more than 1.2 million votes cast. *See* Ronald Smothers, *Republican Ousts Georgia Senator*, N.Y. TIMES, Nov. 25, 1992, at A1. Assuming a rate of improper balloting similar to that in Guam and assuming a majority vote requirement, none of these races could produce a winner if subjected to the requirements imposed by the Ninth Circuit's reading of § 1422. Runoffs would be required in all of them, and there would be no guarantee that even the runoff would produce a winner.

This could not be what Congress intended when it passed § 1422. The Ninth Circuit's application of the rule of statutory interpretation that no provision should be construed to be entirely redundant is not appropriate in this case because it leads to an untenable result. A canon of construction should be disregarded where its "application would render a regulation inconsistent with the purpose and language of the authorizing statute." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703, 111 S. Ct. 2524, 2537 (1991). The purpose of the statute at issue here is to provide for the election of the governor of Guam. The Ninth Circuit's application of the canon it has selectively chosen would frustrate that purpose immeasurably. This Court "should not and will not countenance" an interpretation of § 1422 that "leads to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120, 108 S. Ct. 1666, 1674 (1988) (internal quotations and citations omitted).

B. *The Ninth Circuit's Interpretation Ignores This Court's Long-Standing Definitions of "Election" and "Vote."*

Section 1422 commands that a runoff election be held if "no candidates receive a majority of the votes cast in any election." The Ninth Circuit rewrote that language to require a runoff if no candidates receive a majority of all the *ballots cast in the general election.* Such an interpretation ignores the fact that the words and phrases at issue here have already been assigned clear meaning both by this Court and by the Ninth Circuit itself.

On November 8, 1998, Guam did not hold just one election. Although there was only one ballot used, Guam held *multiple* elections to choose the governor and lieutenant governor, the congressional delegate, members of the legislature, and members of the school board. Each of those was a separate election. Only the gubernatorial election is mentioned in § 1422. When § 1422 refers to "in any election," it can only be referring to "any gubernatorial general election."

An election fills only one office, or, as in this case, a slate of offices (governor and lieutenant governor). The Court made this clear in *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464 (1997), when it defined "election" for purposes of 2 U.S.C. §§ 1 and 7: "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of *an* officeholder (subject only to the possibility of *a* later runoff)." 522 U.S. at __, 118 S. Ct. at 467 (emphasis added) (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "the act of choosing a person

to fill an office")). Note the singular: *the election* results in the selection of *a person* to serve as *an officeholder.*

When this Court defined "election" in *Foster*, it was building upon a substantial body of law holding that when used in the Constitution or the United States Code, "election" refers to a single choice, not a series of choices unconnected by statute or common sense. *See, e.g., United States v. Classic*, 313 U.S. 299, 318, 61 S. Ct. 1031, 1039 (1941) ("From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified voters of their choice of candidates); *Newberry v. United States*, 256 U.S. 232, 250, 41 S. Ct. 469, 472 (1921) (holding that an election for purposes of Article I, Section 4, of the Constitution is the "final choice of an officer by the duly qualified electors."); BLACK'S LAW DICTIONARY 517-18 (6th ed. 1990) (defining "election" as "[a]n expression of choice by the voters of a public body politic. . . . [T]he expression by vote of the will of the people.").

Foster and the blocks on which it is built support the petitioner's position in a second way. They illustrate why the undervotes and overvotes in the Guam election cannot be included among the "votes cast." They are not votes at all, because they do nothing to advance "the final selection of an officeholder." *Foster*, 522 U.S. at __, 118 S. Ct. at 467. When a voter leaves a ballot blank, he is not "expressing . . . his choice of candidates," *Classic*, 313 U.S. at 318, 61 S. Ct. at 1039, so he cannot be participating in an election as this Court has defined that term. Likewise, to vote for both candidates when instructed to choose one is not to make a "final choice of an officer," *Newberry*, 256 U.S. at 250, 41 S. Ct. at 472, but to decline to do so. This Court's holdings, then, support what Guam's own election code explicitly

establishes: blank ballots and improperly marked ballots are void and need not be counted. *See* 3 Guam Code Ann. §§ 11111, 11114. They are not votes cast because the elector has chosen not to express his or her choice.[7]

C. *The Ninth Circuit Could Have Avoided Its Misinterpretation by Looking to Its Own Precedent.*

The apparent reason for the Ninth Circuit's contortionist efforts in this case is the perceived necessity to avoid rendering the phrase "in any election" redundant. But the Ninth Circuit did not need to strain so hard to find meaning in the words of the statute. It should simply have looked to its own decision in *Jose v. Mesa*, 503 F.2d 1048 (9th Cir. 1974). In that case, a Guam citizen challenged Guam's primary system for the selection of party candidates for governor and lieutenant governor. Guam's primary system allowed the candidate receiving a plurality of the vote in the June primary to be nominated for a place on the November general election ballot. The challenge argued that the phrase "in any election" in § 1422 must be applied to primaries, an interpretation that would have

[7] The Respondents cannot seriously contend that non-voting by leaving a ballot blank with respect to the gubernatorial slate (or by voting for both slates) is entitled to any significance, perhaps as a measure of voter disenchantment with the choice of candidates. The function of an election is to select an officeholder, *see Foster*, 522 U.S. at __, 118 S. Ct. at 467, not to express discontent. *See Burdick v. Takushi*, 504 U.S. 430, 438, 112 S. Ct. 2059, 2066 (1992) ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") (internal quotations and citations omitted).

required a party nominee to secure a majority in the primary. *See id.* at 1048-49. The court held otherwise:

> Directly after the "in any election" language . . . appears the sentence: "The first election for Governor and Lieutenant Governor shall be held on November 3, 1970." Congress's repetition of the unqualified term "election" in this sentence indicates that the draftsman meant "general election" by the use of the term "election" throughout the section; otherwise, it would have been natural to add the word "general" to this sentence setting the election date.

Id. at 1049. Both the court's conclusion and methodology in *Mesa* are noteworthy and should have served as a model for the Ninth Circuit in the instant case.

The ultimate conclusion is important because the *Mesa* court assigned an ordinary meaning to "in any election" without jumping through hoops to do so. The phrase is not "entirely redundant," as the Ninth Circuit feared in *Ada*, because it serves to limit the "majority of votes cast" requirement to general elections.

It is also instructive that the court in *Mesa* arrived at its conclusion by examining the phrase in context and reviewing the substance of the entire statute. Had the Ninth Circuit undertaken a similar examination in the instant case, it would have adopted the interpretation of § 1422 urged by the petitioners. It would have observed, as the *Mesa* court did, that directly after the "in any election" language in the statute appears the sentence: "The first election *for Governor and Lieutenant Governor* shall be

held on November 3, 1970." Surely the Ninth Circuit would have reasoned that Congress's earlier use of the unqualified term "election" indicates that the draftsman meant "general election for governor and lieutenant governor" by the use of the term "election" throughout the section; otherwise, it would have been natural to add the words "for any office" to the sentence requiring the runoff.

II. *County of Cass v. Johnson* Controls the Outcome of This Case and Instructs that Undervotes and Overvotes Should Not Be Counted.

Before the Ninth Circuit, the petitioners took the position that the outcome of this case is controlled by the Court's decision in *County of Cass v. Johnson*, 95 U.S. 360 (1877). The *Cass* holding, which both the Petitioners and the Ninth Circuit quote, states:

> This we understand to be the basic rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

Id. at 369. Under this rule, Gutierrez won the election, because the undervotes would not be counted in the vote total. Those individuals who chose not to vote in the gubernatorial election would be presumed to assent to the will of those who did participate.

The Ninth Circuit declined to apply *Cass* for two reasons, neither of which survives scrutiny. First, the court observed that *Cass* addresses the issue of whether qualified voters who do not go to the polls should be included when calculating a majority. *See Ada*, 179 F.3d at 681. The court asserted that "[q]ualified voters who did not participate in the Guam election are not at issue in this case." *Id.* In fact, they are at issue. Those qualified voters who cast blank ballots *did not participate* in this election. They did not take an action "meant to make a final selection of an officeholder." *Foster*, 522 U.S. at __, 118 S. Ct. at 467. Likewise, those qualified voters who pulled levers for both Gutierrez and Ada did not make an "expression . . . of their choice of candidates." *Classic*, 313 U.S. at 318, 61 S. Ct. at 1039. The electorate expresses its will and makes the final selection of an officeholder in an election by *voting*. The mere fact that the people in Guam went to a polling place and picked up a ballot does not differentiate them from the voters in *Cass* who stayed home. None of them voted.

The second reason offered by the Ninth Circuit for declining to apply *Cass* is that "*Cass* expressly notes that this principle applies only in the absence of a statutory provision to the contrary." *Ada*, 179 F.3d at 681. That is an accurate restatement of the portion of *Cass* that the court quoted in its opinion, but it ignores the very next sentence of *Cass*: "Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." 95 U.S. at 369. Based on its opinion in the instant case, the Ninth Circuit cannot believe that Congress "clearly expressed" its intention that undervotes and overvotes be counted in Guam's gubernatorial elections. To the contrary, the Ninth Circuit implicitly

admitted that it views § 1422 as ambiguous: "[i]f the statute is ambiguous, resort to legislative history is appropriate." *Ada*, 179 F.3d at 676. After making this statement, the Ninth Circuit proceeded to resort to legislative history. *See id.* at 678-79. The court also found it necessary to effectively rewrite the statute. *See id.* at 677 n.5 ("Admittedly, this interpretation equates 'votes cast' with 'ballots cast.'") Presumably, if the Ninth Circuit believed that Congress had "clearly expressed" its legislative will, it would not have felt compelled to replace words that appear in the statute with words that do not. In fact Congress did not clearly express its will that undervotes and overvotes be counted, so *Cass* controls. Those who did not vote properly must be deemed to assent to the will of the majority, which voted for Gutierrez.

III. The Ninth Circuit's Reliance on Its Comparison of § 1422 with 48 U.S.C. § 1712 Is Inappropriate.

The Ninth Circuit found support for its misinterpretation of § 1422 by comparing its language with that of 48 U.S.C. § 1712, which provides for the election of a delegate from Guam to Congress. Section 1712 provides in pertinent part:

> The Delegate shall be elected at large, by separate ballot and *by a majority of the votes cast for the office of Delegate*. If no candidate receives such a majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate.

48 U.S.C. § 1712 (emphasis added).

The Ninth Circuit deduced that "[i]f Congress had intended a gubernatorial slate to require only a majority of the votes cast for governor and lieutenant governor, presumably, it would have used language similar to that used in § 1712." *Ada*, 179 F.3d at 678. The court continued:

> Furthermore, given the fact that § 1422 and § 1712 involve the closely-related subjects of the election of Guam's governor, lieutenant governor, and delegate to Congress, it can be inferred that, by employing such clearly different language, Congress intended to depart from the scheme fashioned in § 1422, when it enacted § 1712 four years later.

Id.

Indeed, there are obvious differences in the language of the two statutes, and these differences form a large part of the basis for the Ninth Circuit's decision. *See id.* However, the Ninth Circuit's reliance on the distinction in word usage in statutes passed by different Congresses four years apart from one another is misplaced.

Section 1712 in no way aids in interpreting § 1422. Put bluntly, § 1712, coming four years after the enactment of § 1422, is

> beside the point. [It does] not declare the meaning of earlier law. [It does] not seek to clarify an earlier enacted general term. [It

> does] not depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute. [It does] not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions. Consequently, we do not find in [it] any forward looking legislative mandate, guidance, or direct suggestions about how courts should interpret the earlier provisions.

Almendarez-Torres v. United States, 523 U.S. 224, ___, 118 S. Ct. 1219, 1227 (1998) (citations omitted).

A review of § 1712 shows that *none* of the *Almendarez-Torres* factors are present here. Section 1712 does not declare the meaning of § 1422, as it does not say anything about what is required for victory in a gubernatorial election. Section 1712 does not depend for its effectiveness upon clarification of or a change in the meaning of § 1422. Most importantly, § 1712 does not reflect any direct focus by Congress upon the meaning of the earlier enacted § 1422. Rather, it reflects a focus on an entirely different office by an entirely different Congress.

The language in § 1712 simply states more clearly what Congress undoubtedly thought it was expressing in § 1422. The meaning that Congress intended when it enacted § 1422 is clearly established by a contextual reading of the plain language of the statute, the precedent of this Court in *Foster*, *Classic*, and *Newberry*, the Third Circuit's decision in *Todman v. Boschulte*, 684 F.2d 939 (3d Cir. 1982), and even the Ninth Circuit's holding in *Mesa*. Congress's subsequent enactment of an unrelated but better-worded statute cannot change that meaning.

CONCLUSION

For these reasons and those stated by the petitioners, amicus respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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